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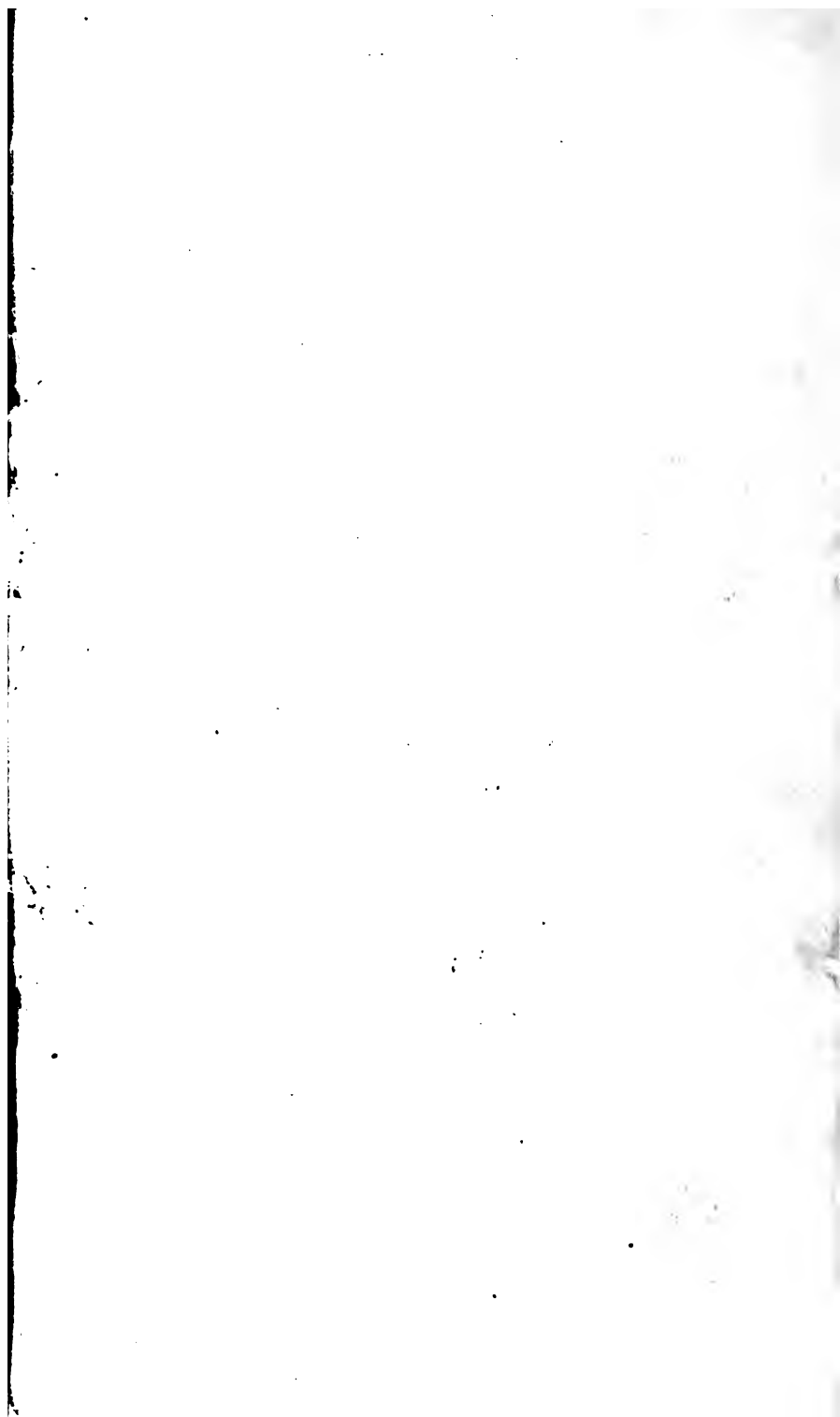
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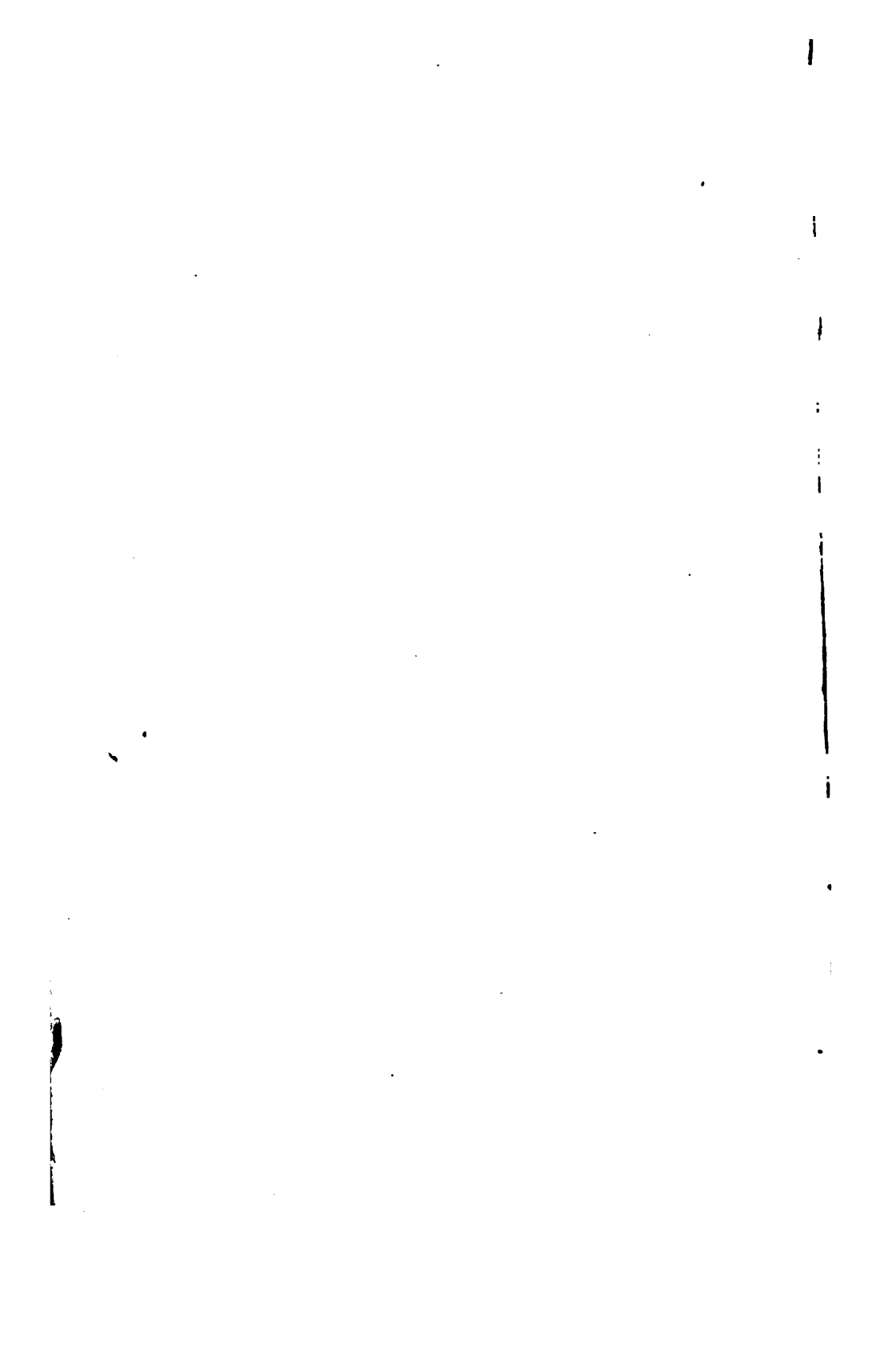
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THE

MICHIGAN NISI PRIUS REPORTS.

REPORTS OF CASES

TRIED AND DETERMINED AT NISI PRIUS, IN

THE CIRCUIT COURTS

OF THE

STATE OF MICHIGAN.

BY CHARLES R. BROWN;

JUDGE OF THE NINTH JUDICIAL CIRCUIT.

"Juris procuratio omnibus prodest."

KALAMAZOO:

TELEGRAPH PRINTING COMPANY BOOK-OFFICE.

1871.
LITCHFIELD

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Entered according to Act of Congress, in the year 1871, by

CHARLES E. BROWN,

In the Clerk's Office of the District Court of the United States, in and for the
Western District of Michigan.

93102.

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TRIED AND DETERMINED
A T
NISI PRIUS,
IN THE
Circuit Courts of the State of Michigan.

CIRCUIT JUDGES.

- | | |
|---------------------------------|--|
| 1. DANIEL L. PRATT, Hillsdale. | 9. CHARLES R. BROWN, Kalamazoo. |
| 2. DANIEL BLACKMAN, Cassopolis. | 10. JOHN MOORE, Saginaw City. |
| 3. JARED PATCHEN, Detroit. | 11. DANIEL GOODWIN, Detroit. |
| 4. SAMUEL HIGBEE, Jackson. | 12. JEREMIAH O'GRADY, Houghton. |
| 5. GEO. WOODRUFF, Marshall. | 13. JONATHAN G. RAMSDELL, Traverse City. |
| 6. JAMES S. DEWEY, Pontiac. | 14. AUGUSTINE H. GIDDINGS, Newaygo. |
| 7. JOSIAH TURNER, Owosso. | 15. CHARLES UPSON, Coldwater. |
| 8. LOUIS S. LOVELL, Ionia. | 16. WILLIAM T. MITCHELL, Port Huron. |
-

EDSON TERRILL *vs.* CASSIUS G. GROVE.

In this State there is by statute no non-bailable *capias* by which suits may be commenced, but in all suits commenced by *capias* there must be endorsed on the writ an order to hold to bail, made by the Circuit Judge or Circuit Court Commissioner, on a proper affidavit.

2. This affidavit to hold to bail must be positive, and must make out a *prima facie* case against the defendant.
3. An affidavit to hold to bail in an action for alleged representations on a sale or exchange of lands, if such action may be commenced by *capias*, should allege, in substance, that the defendant knew the representations to be false, and that they were made by him with the intent to deceive and defraud the plaintiff.

Branch Circuit, October, 1870.

This was a suit commenced by *capias*, claiming damages for

 TERRILL v. GROVE.

fraudulent representations in the sale or exchange of certain lands. An order to hold to bail had been obtained of a Circuit Court Commissioner, an affidavit made by the plaintiff, and the defendant had been arrested on the *capias* on which the order had been endorsed.

The writ was made returnable at the October term of the Circuit Court for the county of Branch, 1870.

The defendant, by his attorney, on the first day of the term moved the Court to quash and set aside the writ and the subsequent proceedings thereon, with costs, for the following reasons :

1st. There is no allegation in the affidavit upon which the order to hold to bail was granted ; that the defendant knew the representations to be false at the time he made them.

2d. There is no allegation in the affidavit that the plaintiff trusted, relied upon, or believed the representations to be true.

3d. There is no allegation in the affidavit that the representations were made by the defendant with an intent on the part of the defendant to cheat and defraud the plaintiff.

C. B. Pratt, Plaintiff's Attorney.

C. C. Parker, Attorney for Defendant.

The following is a copy of the affidavit on which the order to hold to bail was made by the Commissioner :

STATE OF MICHIGAN, }
 BRANCH COUNTY } ss.

Edson Terrill, of said county, being duly sworn, says that on the 2d day of June, A. D. 1870. he purchased of Cassius G. Grove, certain lands, described as follows, situate, lying and being in the county of Stone and State of Missouri, known and designated as follows, to wit : " The North East one quarter of Section twenty-five, in Township twenty-three, North range twenty-three West, containing one hundred and sixty acres, more or less." That said deponent paid said Cassius G. Grove for said above described premises, the house and lot then occupied and owned by this deponent, in the City of Coldwater, Branch County, Michigan, being described as lot number 17, in Cutler's addition to the City of Coldwater aforesaid, and that

TERRILL v. GROVE.

said house and lot was worth at that time the sum of seventeen hundred dollars, and there was then upon said premises a mortgage amounting to the sum of nine hundred and twenty-two dollars, and this deponent further says that the said Missouri land above described was in the name of Flora J. Grove, wife of said Cassius G. Grove, and that said Cassius G. Grove in consideration of said sale as aforesaid to this deponent, caused his said wife to deed said premises, on the date aforesaid, by warranty deed to this deponent, and this deponent at the date aforesaid, deeded said house and lot to said Flora J. Grove, at the request of the said Cassius G. Grove, and this deponent further says that said Cassius G. Grove to induce this deponent to make said purchase, and to induce him to deed said house and lot to the said Flora J. Grove, did represent to this deponent, that said land so deeded to this deponent, was all good farming land, a part of which was prairie and a part of which was good timbered land, and that his wife had a good and perfect title of the same. All of which representations and statements were false and fraudulent, and by which said false and fraudulent statements and representations, he, the said Cassius G. Grove, in fraud of deponent's rights, did defraud deponent out of said house and lot, worth, as he believes, over and above said mortgage, the sum of eight hundred dollars.

Whereupon he prays the said Cassius G. Grove may be held to bail, &c.

EDSON TERRILL.

Subscribed and sworn to before me, this 7th day of October, A. D. 1870.

A. T. LAMPHERE,

Notary Public,

Branch County, Mich.

By the Court, UPSON, J.—To authorize the plaintiff to commence his action by *capias ad respondendum* in this case, under the statute, it was necessary for him to procure from the Circuit Judge or Circuit Court Commissioner, an order to hold to bail, to be endorsed on the writ, upon an affidavit to be made by the plaintiff or some person in his behalf, showing the nature of the plaintiff's claim. 2 *Comp. Laws*, § § 4121, 4122.

DUSTIN v. DICKINSON, *et. al.*

If not, and if this is an action for damages arising upon contract, express or implied, then the statute has made no provision for a *capias* in such cases of debt arising out of or founded on a contract, express or implied, where fraud is the gist of the action, as specified in Section 33, of Article 6, of the Constitution of this State, as § 4119, 2 *Comp. Laws*, does not include such a case in enumerating the instances in cases of contract in which a *capias* may issue.

This affidavit to hold to bail must be positive, and must make out a *prima facie* case against the defendant. *Saterlee vs. Lynch*, 6 *Bill*, 228.

See also note *a* to same case and the cases there cited. *Graham's Prac.*, 160; 1 *Tidd's Prac.*, 172; 1 *Sillon's Prac.*, 35.

The affidavit, to show a cause of action in this case, should have alleged in substance that the defendant knew the representations to be false, and that they were made by him with the intent to deceive and defraud the plaintiff. 1 *Chitty's Pl.*, 388; 2 *Chitty's Pl.*, 687; 3 *Term Reports*, 51; 2 *Wend.*, 385; 7 *Wend.*, 380; 11 *Wend.*, 374; 1 *Doug. Mich.*, 51.

This affidavit not containing any of these allegations, is fatally defective, and was insufficient to authorize an order to hold to bail and to justify the arrest of the defendant; and as under our practice in this State, as regulated by statute, if the arrest and special bail cannot both be required, a *capias* cannot be issued, and as under our statutes we have no non-bailable *capias* for the commencement of suits, (2 *Comp. Laws*, § § 4119, 4121 and 4122; *Green's Prac.*, § 115; *Ortman vs. Dustin*, 1 *Mich. Nisi Prius*, 101.) therefore the motion must be granted, and the *capias* in this case with the subsequent proceedings thereon must be set aside with costs, the defendant stipulating not to bring any suit against the plaintiff or the Sheriff.

SELAH DUSTIN vs. ASA D. DICKINSON, *et al.*

A commenced suit in the Circuit Court for the county of Wayne, against D and H. D. then resided in N. Y. and H in Wayne Co., Michigan. Pending the suit, H moved to Illinois. Defendants then apply, under Act of Congress approved March 2, 1867, to remove the cause to the U. S. Court. Application denied.

Wayne Circuit, December, 1870.

DUSTIN v. DICKINSON, et. al.

Levi Bishop, for Plaintiff.

C. I. Walker, for Defendant.

By the Court, PATCHIN, J.—This is a petition to remove the cause to the United States Court, on the ground that both defendants are *non* non-residents, under the law of Congress, approved March 2, 1867, which provides that “when a suit is now pending or may hereafter be brought, in any State court in which there is controversy between a citizen of the State in which the suit is brought, and the citizen of another State, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, such citizen of another State whether he be plaintiff or defendant, if he will make and file in such State court an affidavit, stating that he has reason to and does believe that from prejudice or local influence he will not be able to obtain justice in such State court, may at any time before the final hearing or trial of the suit file a petition in such State court for the removal of the suit”; and by a prior law, upon the party presenting a petition, accompanied by a sufficient bond, it is made the duty of the State court to accept the surety and proceed no further in the cause.

At the commencement of the suit the defendant Dickinson was a resident of the State of New York, and the defendant Hodges, who is jointly liable as well as equally interested, was a resident of the City of Detroit, and within the jurisdiction of this Court, and remained so until the pleadings had been put in and the case placed upon the docket for trial for several terms, at some of which it was continued upon the motion of said Hodges. Afterward he removed to the State of Illinois, where he now resides.

The case has been once tried in this Court, and a new trial ordered by the Supreme Court, pending which this petition was filed. It will be seen that the law as it stands seems to intimate that no matter that a State court has acquired jurisdiction in the proper manner, and exercised it correctly almost to the close of the case, yet the defendant, finding that he is about to be defeated, may by filing the required affidavit (and it is not at all unusual for a defeated party to imagine that great injustice has been done) not only take away the

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properly acquired jurisdiction of the State court, but to compel the United States Court to assume it without the consent of either.

But how much the well known rulings of the courts on this subject, together with the presumption that Congress always intends to pass wholesome and proper laws, will militate against this construction, is not necessary to consider in this case, for it is conceded that at the time of the commencement of the suit it could not be brought in the United States Court, the defendant, Hodges, being a resident of this State. At that time, clearly, the jurisdiction of this Court was complete, and not concurrent with any other. It has long since been established, and cannot now be questioned, that when the jurisdiction of a court of the United States had once attached, no subsequent change in the condition of the parties will oust it. (*See 15 How. 198, and 12 Peters, 165; 2 Wheat., 280, as well as a uniform line of cases on the subject.*)

It seems to me to be the duty of the State courts to adopt the rule, thus firmly established in the United States, *at least* so far as to say that when the *sole* jurisdiction of the State court has once attached, no subsequent change in the condition of the parties will oust it.

I am of the opinion, therefore, that the case at bar does not come within the meaning of the law above referred to, and the petition should be denied.

WILLIAM J. CALVERT *vs.* MOSES A. McNAUGHTON, *et. al.*

A Circuit Court has no general discretion to allow an appeal from the judgment of a Justice of the Peace based upon the equities of the case.

Such appeal can be allowed under Sec. 190, of the Justice's Act, only where the party desiring to appeal was prevented from doing so within five days after judgment rendered, by circumstances beyond his control, and it is not beyond his control to see that the officer before whom he swears to an affidavit, signs the *jurat*, before he files it with the Justice.

Jackson Circuit, October, 1870.

W. K. Gibson, for Petitioner,

J. R. Parsons, *Contra.*

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By the Court, HIGBY, J.—The plaintiff recovered a judgment against the defendants, before a Justice of the Peace.

This application is made under Sec. 190, of the Justice's Act, which provides in substance that appeals may be authorized by the Circuit Court after the expiration of five days, where the party making the appeal has been prevented from taking the same by circumstances not under his control.

The petition shows that within five days after the judgment was rendered, the defendant, McNaughton, (the petitioner,) went to the office of the Justice who rendered the judgment, for the purpose of appealing the suit; that he filed with him the necessary bond and paid the costs and fees required by law for making a return; that an affidavit was prepared and signed by him, to which he was sworn by the Justice; that he left it with the Justice in that condition, the Justice not having signed the *jurat*; that the Justice made return to the Circuit Court, but the appeal was dismissed, on the ground that there was no affidavit.

In support of the petition it is claimed that a case is presented showing that the petitioner was prevented from taking his appeal by circumstances not under his control.

In the case of *Draper vs. Tooker*, 16 Mich., 77, the Supreme Court says: "It is quite clear that the statute did not intend to give a general discretion to the Circuit Court to allow appeals in any case after five days, where in their judgment it would be equitable, or where the party has made a mistake or drawn an erroneous inference; but that by the restrictive language used, the intention was to confine that discretion to the class of cases in which the appellant has been prevented from appealing within the five days, by circumstances beyond his control."

In taking an appeal it is required that the appellant, amongst other things, shall within five days after the rendition of judgment, present to the Justice an affidavit. Sec 184, Justice's Act.

The paper filed with or *presented* to the Justice in this case was not an affidavit, there being nothing upon it to show that it had been sworn to. It was within the power of the petitioner to have filed with him an affidavit; in fact it was as much within his power to have presented an affidavit as to have presented the paper which he did.

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He could have seen to it that the *jurat* was signed; in fact he could not present it to the Justice *as an affidavit* until it was signed. If the Justice at his request refused to sign it, he could have sworn to it before any other officer authorized to administer oaths.—It was wholly at his own option that he left the paper with the Justice in the condition it was, and in no respect a circumstance beyond his control.

If the Court had a discretion to allow an appeal on equitable grounds, I should feel disposed, inasmuch as the paper was sworn to before the same officer with whom it was to be left or filed, to allow the appeal, but under the construction given to the law by the Supreme Court I must deny the petition.

[But see *Lunbard vs. Zimmerman*, 1 Mich. Nisi Prius, 313.—*Ed. Nisi Prius.*]

 CALEB EATON vs. WILLIAM CAMPBELL, *et al.*

After judgment for the defendant in replevin, an execution was issued in form of a plaintiff's execution in *assumpsit*. After return unsatisfied, this suit was brought on the replevin bond. *Held*, on the trial, that the execution so issued could not be received in evidence, it not being an execution in the replevin suit.

The plaintiff thereupon submitted to a voluntary non-suit, with leave to move to set the same aside.

On motion to set aside the non-suit and for leave to amend such execution, *Held*, that the defendants could only be made liable on the bond by the return unsatisfied of an execution in the replevin suit, and that the amendment asked for ought not to be allowed for the purpose of creating a liability not already incurred.

Washtenaw Circuit, December, 1870.

H. J. Barks and *C. Jos'in*, for Plaintiff.

Norris & Uhl, for Defendants.

By the Court, HIGBY, J.—A suit was commenced in this Court by writ of replevin in favor of the defendant, James Pearson, Jr., vs. Caleb Eaton, the present plaintiff. The defendants, William L. Yost and William Campbell, became sureties of Pearson in the replevin bond.

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Judgment was rendered in that suit in favor of Eaton, the defendant therein, for the value of the property replevied and the costs of suit, and an execution was issued in favor of Eaton against Pearson, in the form of an execution in favor of a *plaintiff in assumpsit*, and returned unsatisfied.

This suit is against the plaintiff and his sureties on the replevin bond.

On the trial of the case the execution in form in assumpsit, as above, was offered in evidence, with the return of the officer, unsatisfied. It was objected that it was no execution in the replevin suit, and the objection was sustained. Thereupon the plaintiff submitted to a non-suit, with leave to move to set it aside.

A motion is now made to set aside the non-suit, and for leave to amend the execution so as to make it in form an execution for defendant in replevin.

The statute, *C. L.*, § 5043, provides that if an execution in favor of the defendant in the action of replevin shall be returned unsatisfied, in whole or in part, such defendant or his representatives may have an action upon the bond &c. In order to make the obligors in the bond liable, it is necessary that an execution upon the judgment in replevin shall be returned unsatisfied in whole or in part.

The Supreme Court in the case of *Williams vs. Vail*, 9 Mich., 162, decided in a case precisely like this, that the execution in form in assumpsit, was not an execution in the replevin suit, and that it was error in the court below to admit it in evidence. The Court say 'it was not in any proper sense an execution upon that judgment.'

If this is correct it follows that no execution formal or informal, has been issued in the replevin suit, and there is none to amend.

The effect of the motion then is not to amend, but to create an execution in the replevin suit, and apply to it the Sheriff's return upon the execution in assumpsit.

Courts have been and should be liberal in granting amendments as between the parties to a suit. In this case if the execution issued had been levied on Pearson's property, and an application to amend had been made, so as to protect the levy, or even after sale to protect the title of a purchaser, I think it probable the amendment should have been allowed. At any rate it would have presented a much stronger case.

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The application in such case would be to protect the title of purchasers under the process of the Court, no injury to the parties resulting. This application is for the purpose of making persons not parties to the suit liable to an action—to create a liability not already established by law.

By the law they are not liable to an action on the bond until an execution shall be issued in *that suit* and returned unsatisfied. No such execution has been issued. These defendants were not liable when this suit was commenced and are not now liable. Can they be made so by an amendment of the execution in assumpsit so as to make it read as though it had been issued in the replevin suit. It seems to me not. It would be an abuse of the power of allowing amendments.

I must therefore overrule these motions with costs.

MICHAEL BROWN *vs.* BYRON R. PORTER, RICHARD C. TRAVER AND AUGUST WIDDEMAN, Administrator, &c., of CHARLES BRUTLER, deceased.

The doctrine is well settled that a vendor of land, if he has taken no security, although he has made an absolute conveyance by deed, acknowledging full payment of the consideration, yet retains an equitable lien for the purchase money, unless there be an express or implied waiver and discharge of it.

A conveyance by the grantor without security, for the purpose of allowing the grantees to execute a mortgage on the property to a third person as security for a loan of money, to be used in payment of a portion of the purchase price, the grantor taking the grantee's personal bond, without security, for the payment of the remainder of the purchase price, is not a waiver of the equitable lien as to such remainder subject to the mortgage.

And in case of a sale of such premises by advertisement or foreclosure of the mortgage so given, such equitable lien for the remainder of the purchase price may be enforced against any surplus money remaining after payment of the mortgage and costs of foreclosure.

Washtenaw Circuit in Chancery, December, 1870.

O. Hawkins, for Complainant.

Lawrence & Frazer, for Defendants.

By the Court, HIGBY, J.—The bill alleges that complainant sold

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a farm to Richard C. Traver and Charles Brutler for \$1,500—\$750 down, and the balance in four annual payments.

That the grantees had no money to pay down, and it was arranged that they might give to Robert McCormick a mortgage on the granted premises, to secure a loan of the money to make said down payment, and such mortgage was given to secure \$800. That Traver and Brutler were partners as gunsmiths, and used the premises for their business until Brutler's death.

That for the balance of purchase price Traver & Brutler were to give and did give to complainant their bond, payable as above, instead of a mortgage, to enable grantees to give the mortgage to McCormick, and were to keep the premises insured and assign the policy to complainant as security, which, however, they did not do. That Brutler died, and August Widdeman was appointed his administrator.

That the mortgage to McCormick not being paid, was foreclosed by advertisement, February 5, 1870. The premises were sold at auction by defendant, Porter, as Sheriff, for \$1,875

That after Brutler's death, Traver gave a mortgage to Lewis C. Risdon, for \$295 23, payable in two years from date, on which is now due \$318 20.

The amount due with costs on McCormick's mortgage, at time of sale, was \$991 60, leaving balance in Sheriff's (Porter's) hands, \$866 20.

That Brutler died insolvent. That there is now due on the bond to plaintiff \$420 50, and that the firm of Brutler & Traver was insolvent at Brutler's death, and that Traver is insolvent.

Complainant claims an equitable lien on surplus money in Sheriff's hands.

General demurrer to bill for want of equity.

JUDGE LAWRENCE for defendants, in support of the demurrer, claims that the complainant by conveying the land for the purpose of enabling the grantees, Traver & Brutler, to give the mortgage to McCormick, and receiving only their bond for the balance, waived his claim to an equitable lien on the land for the balance of the purchase price.

It is not disputed, indeed the doctrine is very clearly settled, that the vendor of land, if he has taken no security, although he has

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made an absolute conveyance by deed, acknowledging full payment of the consideration, yet retains an equitable lien for the purchase money, unless there be an express or implied waiver or discharge of it.

It is insisted in support of this demurrer, that a waiver by the vendor of his lien for any purpose whatever, is necessarily a waiver of it entirely, and therefore by waiving the lien for the purpose of enabling the vendees to give this mortgage, the vendor has lost his lien for the balance of the purchase price. I do not think this can be so.

The presumption is in favor of the vendor's lien, and a waiver either express or implied, must be shown affirmatively. 1 *Leading Cases in Equity*, and cases there cited; 3 *American Ed.*

All that can rightfully be presumed or inferred from the facts stated in the bill, is that the vendor so far waived his lien as to consent that the mortgage to be given to McCormick should have priority over his lien, This was secured to McCormick, and there is nothing in the circumstances detailed in the bill to show that any thing more was intended.

I must hold, therefore, that subject to the McCormick mortgage, the vendor's lien remained unimpaired, except as to subsequent purchasers or incumbrances in good faith. Risdon having received his mortgage from Traver without notice of complainant's lien, must of course have preference.

It is further claimed in support of the demurrer that complainant's lien could only attach to the land, and cannot reach the surplus money in the Sheriff's hands, and the land having been sold on the foreclosure of the mortgage, his lien is lost.

But what is this surplus money but a remainder of the estate left undisposed of after full satisfaction of the mortgage?

It is as though a portion only of the property had been sold on foreclosure for the satisfaction of the mortgage, leaving the remainder discharged from its incumbrance. There can be no doubt in such case that the equitable lien on such remainder would have remained unaffected by the foreclosure. In the same way and to the same extent it remains good upon this surplus money. No principle is better established than that a court of equity, when necessary to protect the rights of parties, will follow property, however it may be changed, so long as it can be identified. It may be changed from

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money to land or the reverse, yet so long as it can be identified and shown to be the result or avails of the same property to which the lien originally attached, the Court will protect the equitable rights of parties in it.

The demurrer must be overruled with costs.

JOHN J. REIMOLD vs. FRANK MOORE.

The rule of the civil law giving the privilege of towing on the banks of navigable rivers, and that the privilege is embraced in the public right of navigation, is at variance with the written American constitutional law, and by the common law the privilege of towage on the banks of such rivers was never given except upon the principle of compensation to riparian owners.

Macomb Circuit, September, 1870.

Case commenced before John Stockton, Esq., a Justice of the Peace, of Macomb County. The declaration alleges certain trespasses on the plaintiff's farm, lying on the southerly bank of Clinton river, and bounded on the northerly side by Clinton river, in said county, committed "on the first day of April, 1869, and divers days thereafter, in passing to and fro across said land by horses and men in towing vessels and in navigating said river, and usual allegations of trespass. The plea is the general issue, with a notice that the close, &c, in which the supposed trespasses were committed was the soil and freehold of the defendant, and that defendant in his own right entered upon said land as his own freehold, &c., and further that the same was and is adjacent and along the banks of Clinton river, a navigable stream, which has been used by the public from time immemorial for the purposes of navigation, and that during all that time the public in using the stream for the purposes of navigation, have, in floating rafts, boats, barges and sailing vessels, up and down said stream, found it necessary to tow the same, and that for such purpose the said bank or border of said stream has been used as a path or way in passing up and down said stream by men and animals in towing as aforesaid, without let, trouble, hindrance or molestation, from all and any person owning lands on the said bank of said river.—

REINHOLD F. MOORE.

That the defendant was the captain of a vessel or schooner used in passing up and down said stream, and the acts complained of was done in the necessary towage of said schooner.

A bond was given and the case certified up to the Circuit Court.

It was conceded that the plaintiff was and is the owner of the land described in the declaration, and that it extends to and is bounded by the Clinton river on the north.

It was then proved by the plaintiff that on the first day of April, 1869, his fences ran into the river, and the defendant was on and crossed the land with one horse, towing a vessel. Defendant was seen there twice on the land, towing, and the plaintiff forbid him and told him he would sue, and defendant again came on to the land, and for this plaintiff brought suit; whereupon the plaintiff rested his cause.

The defendant then proved by Hon. Porter Kibbee, that he was the Commissioner named in the law of 1848, p. 47-8, and had known and been acquainted with Clinton river since 1836. That as such Commissioner he saw most of the parties living along the river and spoke to them about building three or four bridges and raising the bank in some places to make a tow-path. He did not recollect any obligations being made. No steps were taken to condemn the land or by legal proceedings to secure the right of way from the owners. He talked with most of the owners about the right to what was necessary, and no objections were made. There was no survey nor any defined width for a tow-path established or agreed upon.

Nathan Moser then occupied the farm now claimed by plaintiff. Could not state whether any improvements had then been made on the farm. Mr. Moser made no claim for compensation. There was a firm on the bridge next above. Messrs. Dickinson & Stockton had charge of making the repairs.

[Considerable further testimony was given relative to the use of the premises along the river bank as a tow-path, and as to improvements made in clearing the river of snags, repairing of bridges, &c., which it is deemed unnecessary to report. —REP.]

Edgar Weeks, Plaintiff's Attorney.

Hubbard & Crocker, Defendant's Attorney.

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By the Court, MITCHELL, J.—There is no satisfactory evidence that the owners ever yielded or assented to the right to use their land for towing purposes, without compensation, any further than that some of them did not forbid the repairs made under Kibbee by Dickinson. On the other hand the testimony does satisfy me that the plaintiff and those under whom he claims, as well as the other owners along the river banks, (except where there was a highway,) have constantly demanded and insisted upon payment for crossing their land, in towing vessels, and that they have not assented to any public right or easement for the purpose of towing vessels in Clinton river. No proceedings appear to have been taken under the law of 1848, p. 47, appointing a commissioner and authorizing the construction of a towing path, except the letting of a contract to clear the river and some slight repairs on the supposed path. No survey was made or any other steps taken, as required by the law for laying out highways, *Rev. Stat. of 1846*, p. 133—4, and to which the commissioner was referred by the act appointing him, as the law under which he was to settle claims, and by which he was to be guided in laying out establishing and constructing said towing path.

No rights to a towing path were acquired under the law of 1848, and that law seems clearly to recognize the fact that a tow-path had not been established, and that it was necessary in some way to settle and determine the claims of the land owners before such a path could be constructed. It follows that the public have no right to cross the plaintiff's land or to use the bank of the river as a tow-path under any statute of this State. The public have not acquired a right to use the land for towing by user from time immemorial, they having been constantly opposed in the free use of the same.

It is said that the civil law gives the privilege of towing on the banks of navigable rivers, and that the privilege is embraced in the public right of navigation.

This is at variance with the common law and with the principles of the written American constitutional law. The right of towage was never given in England except upon the principle of compensation to the riparian owners. The question was brought directly before the King's Bench, in *Ball vs. Herbert*, 3 *T. R.*, 253, whether at common law the public have the right of towing on navigable rivers, and it was expressly decided that they had not. It was the general

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opinion of the Judges that the right of towing depended on *usage*, without which it could not exist.

There have been decisions in Illinois and Tennessee partially holding with the civil law, but they are not generally accepted as the law of the United States. These decisions as well as somewhat similar ones in Missouri, do not go to the extent of giving the public a right to a tow-path along the banks, but only to the extent of saying that navigators have a right to land and fasten to the shore as the exigencies of navigation may require. They were undoubtedly founded upon the established usage of the Mississippi, and may so far be reconciled with the current of common law decisions. The right of towage may be acquired by long and unobstructed usage, but not when obstructed or adverse claims are constantly made. See *Kinlock vs. Neville*, 6 *Mees. & Wels., E. Ex.*, 794.

The banks are private property subject to the exclusive appropriation of the owners, and are not subject to the use of the public, (*Morgan vs. Reading*, 3 *Smiles & Marsh.*, 366,) while the questions involved in this case have never been precisely decided in any reported case in this State, yet the general principles that answer them have been substantially determined in the case of *Lorman vs. Benson*, 8 *Mich.*, 18; *Rice vs. Ruddiman*, 10 *Mich.*, 125, and *Ryan vs. Brown*, 18 *Mich.*, 196.

In the first of these cases the common law rule in regard to navigable streams is distinctly applied to our tideless streams, and announced as the law; the Court saying "that the common law rule is the most desirable one so far as fresh water streams are concerned." The second case carries the owner's rights to the centre of the stream for all beneficial purposes, so long as the public right of passage in the stream is not interfered with. And the last announces the broad principle that the riparian owner has the exclusive right to the bank of a stream for any beneficial purpose, and that the public cannot deprive him of the right without due compensation.

If this were not so, docks, booms, mills and all kinds of structures on the bank of a stream, would be illegal, and liable to be torn down or removed as nuisances, if it should be deemed necessary or economical to tow vessels, and they should be in the way of a tow-path.

In view of the whole case, I find that there was at the time when,

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&c., no legal tow-path on the southerly bank of Clinton river; that the public had no right of passage over plaintiff's lands for the purpose of towage, and that the defendant is guilty as charged, and assess the plaintiff's damage at one dollar.

STEPHEN FARGO vs. CYRUS LOVELL.

Where a complainant seeks to redeem real estate conveyed by deed, absolute in form, but intended as a security, which has been in the possession of the mortgagee for over twenty years, the bill must show such facts as will sustain the conveyance as a *still subsisting security* subject to redemption—such facts as brings the case within the statutory exceptions preventing the bar, or rebut the presumption arising from the lapse of time.

Where a party who conveys property apparently in fee, but really as security, and subsequently proposes to relinquish the right to redeem a portion of the property if other property conveyed to secure the same debt should be re-conveyed, and the notes for the unpaid part of that debt surrendered, and where, in response to such proposition the re-conveyance was made and one of the notes re-delivered, and the original grantor became bankrupt before the surrender of all the notes, *Held*, that equity will give effect to the agreement, when such original grantor attempts to enforce his alleged right of redemption.

An injunction may be dissolved where the answer, though not denying specifically the allegations of the bill, sets up matters which if true, are deemed a sufficient avoidance.

On a motion to dissolve an injunction, where the answer sets up matters in avoidance, the complainant may reply by affidavits by way of avoidance, either traversing it or avoiding it by new matter.

Ionia Circuit, in Chancery.

Motion to dissolve an injunction.

Theodore Romeyn, for Complainant.

Blanchard, Bell & Dodge, for Defendant

By the Court, SUTHERLAND, J.—The bill is filed in this case to redeem real estate conveyed by deed, absolute in form, but in fact intended as security, after a possession by the mortgagee for twenty-seven years subsequent to the maturity of the mortgage debt.—Hence it is necessary for the complainant to show by his bill such facts as will sustain that conveyance as a still substituting security subject to redemption. *Reynolds vs. Green*, 10 Mich., 355. They must be facts that bring the case within the statutory exceptions

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preventing the bar, or rebut the presumption arising from the lapse of time. *Campau vs. Chene*, 1 Mich., 406.

The bill attempts to avoid the bar that would arise from the lapse of time and the defendant's possession, by alleging that the defendant fraudulently conveyed the property in apparent fee simple to Michael Lovell, in 1842, and that such title was retained by him until 1849; that complainant was not informed of the re-conveyance for some time afterwards, and was soon thereafter under disability from

The bill does not directly allege that the defendant's dock will be ill health, which continued for several years.

It will doubtless be a prominent question on the final hearing whether these facts if proved, explain and excuse the delay, and preserve the right to redeem. I forbear, on this motion, to express any opinion upon it.

The defendant, by his answer, alleges a parol extinguishment of the equity of redemption over twenty years before the filing of the bill, by the agreement of the parties.

This matter in avoidance is set forth circumstantially in the answer, and is not controverted by any contrary showing. The defendant alleges that the complainant proposed in 1841, to relinquish the right to redeem the premises in question if other property conveyed to defendant to secure the same debt should be re-conveyed, and the notes for the unpaid part of that debt surrendered; that defendant immediately made the conveyance, and in 1843, after regaining possession of one of these notes that had been pledged to a third person, he returned them to the complainant on the express understanding that such surrender and cancelment of the notes should be full satisfaction of the equity of redemption.

The complainant became a bankrupt between making his proposition and the surrender of the notes, and had the equity of redemption not been acquired by him afterwards, his acceptance of the notes might have been inoperative to extinguish the right now claimed; but since he now represents that right, equity may undoubtedly give effect to the agreement in aid of the defendant's long possession as fully as though he had owned it without any interruption.

The only plausible objection that can be urged to this defence, on this motion, is that it is matter in avoidance.

Though it has sometimes been held that an injunction will not

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be dissolved upon an answer alleging such a defence, notwithstanding it is sufficient if true in point of fact, it not being a responsive disclosure to a bill asking discovery, and because the practice was supposed not to allow affidavits to be read controverting the facts on which such defence is based, yet I think such is not the modern practice. The complainant may reply on this motion, by affidavit, to the defence, by way of avoidance, either traversing it or avoiding it by new matter, and in the absence of any such showing to the contrary, an injunction may be dissolved in the discretion of the Court, on such a defence being set up. See *Florence vs. Bates*, 2 Code R. 110; *Opinion by Mason, J.* cited at length in 1 Wat., *Eden on Inj.*; p. 133 and note 1. A defendant ought not to be in a worse position for complainant not having anticipated and negatived such defence in his bill.

The injunction is not important to the complainant in respect to the real estate remaining unsold, for a notice of *lis pendens* will subject all purchasers, *pendente lite*, to the final decree. And should the complainant be decreed to be entitled to redeem and have the proceeds of sale which defendant has made, paid over to him, after the satisfaction of the mortgage debt, there is no reason suggested in the bill to doubt the ability of the defendant to respond to such a decree.

The injunction must be dissolved.

ANDREAS VAN DER BROOKS vs. JOHN CURRIER.

A erected a dock on his premises on the bank of a navigable river. B, an adjoining lot owner was about to construct a dock to extend out into the river some distance beyond A's dock; whereupon A filed his bill of complaint against B, praying for an injunction restraining the defendant from erecting the proposed dock, setting forth that if the proposed dock be constructed, it would make it inconvenient for boats to approach and leave complainant's dock, thereby interfering with and obstructing the free navigation of the river. *Held*, in such case,

1. An injunction will not be granted unless the obstruction complained of will be a practical hindrance to the *public use*.
2. Where a complainant's legal right is doubtful a court of equity will not interfere by injunction before the legal right has been established at law.

Bay Circuit, in Chancery.

Motion to dissolve Injunction.

VAN DER BROOKS v. CURRIER.

By the Court, SUTHERLAND, J.—These parties own adjoining lots on the east side of Saginaw river.

The complainant alleges in his bill that he erected a dock on his premises, five years ago, that it is useful as a place for loading and unloading vessels navigating the river, and that his lot is chiefly valuable for this convenience.

It also alleges that the defendant is in the act of building a dock on his premises, and proposes to extend it out into the river one hundred feet beyond the outer line of the complainant's dock, and beyond the line of other docks on the river; that the defendant's dock if it is permitted to be constructed, will render access to the complainant's difficult; that therefore the defendant's proposed dock will interfere with and obstruct the free navigation of the river, and will hence be a nuisance, and specially injurious to the complainant.

The defendant's answer admits that the parties have contiguous lots; that the complainant has a dock on his; that it is valuable on account of the access by water and the convenience of loading and unloading boats at his dock; that the defendant is in the act of building a dock on his premises, but denies that he intends to build it more than sixty-three feet into the river beyond the complainant's dock.

The defendant denies that his proposed dock will be any impediment to the navigation of the river; that it will encroach upon the navigable channel of the river, or extend beyond the line of other docks. He denies that the complainant will suffer any injury from it or has any right to complain of it; denies, in short, that it will be a nuisance.

The answer is accompanied by a map, made a part of the answer, showing the relative extent of the docks, and other erections along the river, in the vicinity of the premises in question, and the course, width and depth of the river.

There would appear to be outside of the line of docks, and of the defendant's proposed dock, a clear space of over four hundred feet of water, of sufficient depth for boats of large size.

Apart from any inconvenience of access to complainant's dock, and inconvenience in departing from it, from the greater projection of the defendant's dock, there would seem to be no hindrance to nav-

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igation. The bill, fairly construed, alleges no other; if it does, it is freely denied by the answer.

Every encroachment upon a public river is not necessarily, nor *prima facie*, a public nuisance. *People vs. Carpenter*, 1 Mich., 273, 588, 290, and cases there cited; *Queen vs. Betts*, 71 Eng. C. L., 1022.

The gravamen of the complaint in this case is that the defendant by extending his dock out into the stream further than the complainant has built his, there will be an inconvenience in boats approaching and leaving the complainant's dock, because of the necessity to go around that of the defendant. This inconvenience in some measure is manifest.

If the complainant is at liberty to establish the water front of his dock where he pleases, and then has a right to insist that no other person shall build a dock extending further into the stream, and that it shall be left open above and below from that line, he may complain that the defendant in this case threatens an obstruction to that right. If such a right is conceded to the complainant, why may not the proprietor adjoining him on the other side build a dock only half as far into the river, and ask that it may not be incommoded by the complainant's? He could make the same argument that the public have a right to use the entire river, and carried to its ultimate logical results, it would prevent at the option of any riparian owner, any dock at all being built. Admit the argument to this extent, that every erection in any part of the river where the public has a right to pass is a nuisance, and the complainant is in the awkward attitude of asking the prevention of a threatened nuisance in favor of another, of the same nature maintained by himself.

The complainant has no other right in the navigability of the river than all other persons have; in other words, the river is not a highway, in any broader sense in favor of his riparian interests than all persons are entitled to claim for passage.

The test furnished by the case of *The People vs Carpenter*, is the question of fact whether the erection complained of in the highway is or will be a practical hindrance to the public use, not of a way to the stream, or from the stream to private premises, but the public use of the stream itself.

The bill does not directly allege that the defendant's dock will be a practical hindrance except to boats approaching and leaving the

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complainant's dock, and the answer, if the diagram it contains truly represents the river and the docks, shows that no other hindrance or obstruction is likely to result from it.

The depth of water immediately in front of the complainant's dock is not sufficient for vessels of the largest size that are used on the river; the water in front of the defendant's proposed dock is of such depth. Has not the river such depth at the place in question that it may practically be docked to such point as will allow the largest boats to approach without injuriously narrowing the navigable channel? If so, would such dock be a nuisance? 10 *Mich.* 125.

So far as this Court can judge from the proceedings, the proposed dock of the defendant, probably, would not be found by a jury to be a nuisance. Taking the most favorable view for the complainant, his legal right is doubtful. In such cases a court of equity will not interfere by injunction before the legal right has been established at law. *Hart vs. The Mayor, &c., of Albany*, 3 *Puige*, 213; 3 *Myl. & Keen.*, 169; 1 *Id.*, 185; 3 *Atk.*, 391; *Van Bergen vs. Van Bergen*, 3 *Johu. Ch. R.*, 282; *Reed vs. Gifford*, 6 *Id.*, 19; *Angel on Water Courses*, Sec. 452; *Robinson vs. Pittiger*, 1 *Green Ch. R.*, 57; *Omsted vs. Loomis*, 6 *Barb.*, 152; *Walk. Ch.*, 112.

The interference of equity rests on a clear and certain right, and an injurious interruption of that right which upon just and equitable grounds ought to be prevented. 2 *Wat., Eden on Inj.*, 270, and note.

This is not such a case.

The continuance of a special injunction to the hearing where the whole equity of the bill has been denied, is in the discretion of the Court, but will generally be refused, unless for reasons which make the case an exceptional one. If the complainant would by the dissolution lose the entire benefit of his bill in case he should succeed upon the proofs, the Court will ordinarily continue the injunction, but its effect upon the other party will be also considered.

The complainant in this case will not, so far as this Court can anticipate, suffer such a loss of the advantage of his bill, if he establish a right to the relief he seeks.

The commissioner for Saginaw County, acting as Injunction Master, had no authority to allow the injunction.

The injunction must be dissolved.

FOSTER v. WILEY, *et. al.*

ALBERT R. FOSTER vs. MATTHEW WILEY AND WILLIAM J. MONTEITH.

1. When an execution is regular and legal upon its face, and is issued by a magistrate having apparent authority to issue it, the officer serving it will be protected.
2. Where a Justice of the Peace issued an execution on a judgment regularly rendered before him, after the case had been appealed to the Circuit Court, and delivered the same to an officer for collection, and the officer by direction of the attorney of the plaintiff in the execution, levied upon and sold, by virtue thereof, a buggy of the defendant, to satisfy the execution, after having been notified by the defendant that he had appealed the suit, *Held*, in an action of trespass by the defendant against the officer, that he could justify under the execution, and was not liable in that action.
3. A ministerial officer is protected in the execution of process regular and legal on its face, though he may have knowledge of facts rendering it void for want of jurisdiction.

Allegan Circuit, January, 1871.

This was an action of trespass brought by the plaintiff, Foster, against the defendants, Wiley and Monteith, for the taking on execution and disposing of a certain buggy belonging to the plaintiff.—The execution was issued on a judgment rendered in Justice's Court, in favor of Wiley against Foster, which judgment Foster claimed to have duly appealed to the Circuit Court.

A statement of the facts in regard to the appeal, and the ruling of the Court thereon, sustaining the appeal, will be found in 1 *Mich. Nisi Prius*, page 257.

The execution was issued by the Justice after the appeal had been taken, and was delivered to Monteith, who was a Deputy Sheriff, to be collected:

Monteith was notified both by Foster and his attorney of the fact that an appeal had been taken, and the circumstances attending it, and was warned by them not to enforce the collection of the execution, but notwithstanding this, he, by virtue of the execution, which was regular on its face, levied on the buggy in question, when Foster was using it, and unhitching his horses from it took it away and sold it under the execution, acting in the matter under the direction of the attorney of Wiley.

On the trial of this trespasssuit in the Circuit, before a jury, the defendants, by their attorney, submitted to the Court, amongst other

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requests, to charge the jury "that if they found from the evidence that the execution was fair on its face, then they must find for the defendant, Wm, J. Monteith," which request was refused by the Court. The Court also charged the jury on request of the attorney of the plaintiff, Foster, that "the Justice had no power to issue execution after the cause was appealed, and the execution therefore constitutes no protection to the plaintiff in that judgment, and none to the officer either, if he had knowledge of the facts depriving the Justice of jurisdiction, viz: making an appeal to the Circuit." Other requests were submitted on behalf of both defendants and in their justification which were refused, but the chief point relied upon was embraced in the foregoing request to charge on the part of the defendants, which was refused, and in the request to charge on behalf of plaintiff, which was granted.

The jury, under the charge of the Court, rendered a verdict for the plaintiff, and the defendants come and now move the Court to set aside the verdict and grant a new trial, setting up various special reasons therefor, but relying chiefly on the above as to Monteith, the officer, and claiming that there was no evidence in the case connecting Wiley with the alleged trespass, or showing that he had any knowledge of the same.

H. C. Stoughton and H. F. Severens, Attorneys, and of Counsel for Defendants.

J. L. Hawes, Attorney for Plaintiff.

By the Court, UPSON, J.—The general rule as laid down by the authorities seems to be that in cases of this kind if the magistrate has jurisdiction of the subject matter, and if the process is regular upon its face, the officer executing it is protected, and in questioning or reviewing his action, the Court will not look beyond the process to see if he was cognizant of any irregularity in regard to it. 7 *Met.*, 257; 10 *Cush.*, 46; 9 *Conn.*, 140; 5 *Hill*, 440; 24 *Wend.*, 485.

These decisions seem to hold that it is of no consequence even if the officer had knowledge of facts rendering the process void for want of jurisdiction, and to affirm that the officer is protected by

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process regular upon its face, whatever he may have heard going to impeach it. "It will not do," says Parker, C. J., in *Sanford vs. Nichols*, 13 *Mass.*, 288, "to require of executive officers before they shall be held to obey precepts directed to them, that they shall have evidence of the regularity of the proceedings of the tribunal which commands the duty. Such a principle would put a stop to the execution of legal process." This principle of protection to the officer is recognized by our own Supreme Court, in *Wall vs. Trumbull*, 16 *Mich.*, 233, 234, where it is held that a ministerial officer cannot be held liable "where the precept or order under which he acts, comes to him from the proper source, and is within the apparent authority of the body or officer issuing or making it," and in this particular case the Court adds, "and even if the officer had knowledge outside of his certificate, of the facts constituting the alleged illegality, I do not think it would effect the rule of protection." See also 19 *Mich.*, 57; 6 *Mich.*, 144; 1 *Mich.*, 85. In the case before us, the execution was regular on its face, and within the apparent jurisdiction of the magistrate issuing it, and the officer, Monteith, in serving it, seems to come within the rule above laid down, and to be entitled to protection. The charge of the Court on this point having been erroneous, the defendant, Monteith, is entitled to a new trial. 24 *Wend.*, 485. There might be more question as to the other defendant, but as it was virtually conceded on the argument, that if the motion prevailed in regard to the officer it should as to both, the verdict must be set aside and a new trial granted, costs to abide the event of the suit.

MELISSA HOVER vs. JOHN W. HOVER AND LODOWICK HOVER.

When the wife files her bill for divorce, temporary alimony will be allowed, notwithstanding the equities of the bill are denied in the answer. And where the answer on oath charges the complainant with ill conduct, she will be allowed alimony, if such conduct be denied by affidavit.

An injunction may be granted to prevent the husband from disposing of his property, where it appears necessary in order to secure alimony to the wife. And third parties may be restrained from disposing of property claimed by them where the bill alleges such property to belong to the husband, and charges collusion between such third party and the husband

Bay Circuit, in Chancery.

Motion to dissolve injunction on bill and answer.

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The bill is filed for divorce on the ground of extreme cruelty, and asks for alimony.

It charges collusion between defendants, to defeat complainant's application for alimony, by suppressing an unrecorded deed made heretofore by Lodowick to the other defendant, who is complainant's husband, of land worth \$1,600, and by holding out and pretending that Lodowick is the owner of certain specified personal property, which is alleged to belong to John W. Hover. The bill alleges that John was the owner of a certain grey mare, which complainant took into her possession after her husband had ill treated and abandoned her, and which she stills retains. The injunction restrains the defendants from destroying said deed, from selling or disposing of the land or the personal property, and from re-taking said mare.

The motion to dissolve is made on three grounds.

1. That the answer denies all the equity of the bill.
2. That an injunction can not be made auxiliary to any relief that can be granted in divorce cases.
3. That this injunction suspends the right of Lodowick Hover to dispose of his separate property.

The Court will grant alimony only as incidental to other relief.
Har. Ch. R., 19.

Hence if the answer denies the equity of the bill, it negatives the title to that relief to which alimony is incidental—the right to a decree for divorce.

By the Court, SUTHERLAND, J.—

It was contended on the argument that the answer denied the form but not the substance of the allegation in the bill. Some of the denials appeared to me at the time to be liable to that charge, but a closer reading has satisfied me that such portions of the answer had that appearance by inadvertence of the pleader; that there was no attempt to gain the advantage of a denial by a *negative pregnant*. The denials fully cover the averments on which a divorce is asked.

It was principally objected to the answer that the *jurat* did not show that defendants swore positively to the denials of the facts on which the claim of a divorce rests.

As I construe the *jurat*, they separately made oath that the an-

Howe v. Howe, et al.

swer was true of their own knowledge, except as to such matters as were separately stated by both on information or belief.

In that view, the equity of the bill has been fully denied in the answer. It was full. It contains such a statement of complainant's conduct towards her husband, as is not only in marked contrast with her statements in the bill, but such as tend strongly to show that he is the injured and outraged party.

The injunction has been obtained to render effectual a decree for alimony, both temporary and permanent, the former during the pendency of the suit, and the latter afterwards. One is a provision for the time being, to enable the complainant to prosecute the suit, either after a showing of merits, or in spite of a showing to the contrary. The other, as the relief to which she is entitled as an incidental consequence of the decree for divorce.

If the equity of the bill is fully denied, probably an injunction would not be continued with any view to permanent alimony, but other considerations prevail on the subject of the allowances during the pendency of the suit. By our statute such allowance may be granted in the discretion of the Court. 2 *Comp. L.*, § 3234.

A similar statute was in force in New York before our statute was enacted. The construction given to it in New York may be considered as adopted here with the law.

In cases for separation the discretion is sparingly exercised.—There must appear a meritorious cause of complaint. *Worden vs. Worden*, 3 *Educ.*, 387; *Hollerman vs. Hollerman*, 1 *Barb. S. C. R.*, 64; *Snyder vs. Snyder*, 3 *Id.*, 621; *Bissell vs. Bissell*, 1 *Id.*, 430.

In a recent case in that State, the wife being plaintiff, applied for alimony after answer by the husband, not only denying the acts of misconduct and abandonment set up by the complainant, but excusing his own conduct and setting up the ill conduct of the plaintiff. These allegations were neither denied nor explained on the motion for alimony, and it was denied. 2 *Van Santo. Ch. Pr.*, 374, citing *Carpenter vs. Carpenter*, 19 *How.*, 59.

But in cases for divorce, temporary alimony and money to carry on the suit are granted almost of course. *Story vs. Story*, *Walk. Ch R.*, 421; *Wright vs. Wright*, 3 *Educ.*, 62; *Graves vs. Graves*, 2 *Puige*, 61; *Hammond vs. Hammond*, 1 *Clarke*, 151; *Bissell vs.*

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Bissell, 1 Barb. S. C. R., 430; *Goldsmith vs. Goldsmith*, 4 Mich., 285; 3 Barb. Ck. R., 628.

It will generally be granted to her if she as complainant or defendant denies on oath the misconduct imputed to her in the answer or bill of her husband. The courts will not try her guilt or innocence on conflicting affidavits. *Smith vs. Smith*, 1 Edw., 255; *Stanford vs. Stanford*, Id., 317; *Wood vs. Wood*, 2 Paige, 109; *Osgood vs. Osgood*, 2 Paige, 621.

A charge of former or past misconduct or proof of it, does not deprive her of the means of supporting herself during the litigation, and of the means to sustain the suit. 2 *Van Santo Ch. Pr.*, 276.

It would be otherwise, it seems, in case of a present, continuing and notorious misconduct, as living in open adultery while the suit is in progress. *Id.*, citing *Fowler vs. Fowler*, 4 Abbott, 412; *Griffin vs. Griffin*, 21 How., 364; 6 Mich., 285.

These considerations are appropriate to a hearing for alimony, and illustrates the propriety of continuing the injunction if it can be regarded as auxiliary to that relief if seasonably applied for.

2. A few remarks will suffice on the subject of using an injunction to aid in making the relief effectual.

The statute authorizes the Court to act directly on the property of the husband to secure the allowance which may be ordered. 2 *Comp. L.*, § § 3234, 3248.

If any ground is stated which in ordinary cases would justify injunction to prevent a threatened wrong, it will, on general principles, justify resort to this precautionary measure in this class of cases.

3. The supposed separate property which the third ground of the motion alleges that defendant, Lodowick Hover, is prevented from disposing of, is the property which the bill claims to belong to the husband. The injunction operates no further.

The injunction will be continued until the next term of the Court, and until an opportunity is afforded to make an application for alimony, and no longer than till the decision of such an application, if then made, unless continued by order of the Court.

MILLIS v. BAGG, *et al.*

JOHN D. MILLIS vs. M. LAMONT BAGG, Administrator of F. C. MYRICK, Deceased, and others, (his widow and heirs-at-law.)

The personal representative of a deceased mortgagor is not a necessary party to a foreclosure bill.

Where the Register of the Court is appointed guardian *ad litem*, on motion of the complainant, over the infant heirs of a deceased mortgagor, pending proceedings for the foreclosure of a mortgage, his acceptance of the trust should be implied from the fact of appointment; and in case of his failure to answer, the presumption is that there was no valid defence to the bill.

Where the Register of the Court is appointed, on motion of the complainant, guardian *ad litem* of infant heirs of a deceased mortgagor, in a proceeding to foreclose the mortgage; and neglects to answer the bill, and a sale is made in pursuance of a decree of foreclosure, the proceedings will not be set aside unless some wrong has been done, but the irregularity may be cured by filing the answer *nunc pro tunc*.

The reference to take proofs under Ch. rule 92, may be to any commissioner in the State; and it is not necessary that such commissioner shall reside in the county or circuit in which the Court making the order sat.

Bay County, in Chancery.

Petition to set aside decree and sale in a foreclosure suit.

By the Court, SUTHERLAND, J.—The bill was filed in this case May 17, 1861, to foreclose a mortgage made by Myrick, deceased, in his life-time to complainant. After personal service of subpoena on all of the defendants, the infants omitted to procure the appointment of a guardian, *ad litem*, and the complainant obtained an order, *nisi*, July 12, 1861, for the appointment of the Register of the Court.—This order, after due service, was made absolute July 12th of the same year. January 7, 1862, M. Lamont Bagg resigned his trust as administrator, and was discharged by the Probate Court. September 23, 1863, an order *pro confesso*, as to all the defendants was entered, and for the usual reference to take proofs and compute the amount due, to a commissioner of Oakland County. A decree was made May 3, 1864, founded on the proofs so taken.

The Register did not expressly consent to act as guardian, and never filed any answer; nor does the record show any act done by him in that character.

On the 6th July, 1864, a sale was made for more than sufficient to satisfy the decree. A surplus of \$323 87 was reported.

At the next term, James Y. Worden filed his petition to set

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aside the decree and subsequent proceedings, for irregularity, showing therein that he had been appointed administrator *de bonis non*, of said Myrick, deceased, and guardian of said infant defendants, by the Probate Court of Oakland County, and stating further that "to the bill in said cause and the case made thereby, as this affiant is informed and verily believes there is a good and substantial defence on the merits to a large part if not to the whole of the claim therein named."

The following irregularities are insisted upon :

1. The decree was taken after said Bagg ceased to be administrator.
2. No guardian, *ad litem*, was appointed for the infant defendants, the Register not having acted or consented to act.
3. The reference to take proofs, &c., was made by a common order to a commissioner of Oakland County.

The complainant insists that the personal representative of the deceased mortgagor was an unnecessary party, and that the petitioner has no right to make this application in behalf of the infants, in virtue of being their guardian by appointment in the Probate Court.

1. As the bill was not framed to subject the personal estate to the payment of any deficiency, and no deficiency in fact exists, the sale having produced a surplus, the personal representative was not a necessary party. *Abbott vs. Godfroy's heirs*, 1 Mich., 178. And the decree as taken does not purport to affect him, and as executor it can not. The suit was not defective for want of proper parties, as the heirs-at-law of the mortgagor were before the Court. Hence if the decree against the administrator were set aside a re-hearing would not for that reason alone be ordered.

2. The Court would consider the petition in behalf of the infants if they have no *guardian ad litem*, and if they had, it would, if misconduct were alleged against him, for otherwise the infants might be remediless.

If the formal consent of the Register of the Court to act as guardian, in the absence of any subsequent act implying acceptance was requisite to make the appointment complete and to attach to him the responsibilities that appertain to the office of guardian, he was not appointed, and the second objection must be held well taken, for it is

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well settled that no decree can be taken against an infant defendant, unless a guardian has been assigned him. *Jones vs. Crist*, 3 A. R. Marsh., 143; *Shields' heirs vs. Bryant*, 3 Bibb, 525; *Roberts vs. Stanton*, 2 Murf., 129; *St. Clair vs. Smith*, 3 Ham., 363; *Daniels vs. Hannegan*, 5 J. J. Marsh, 49; *Cravens vs. Dyer*, 1 Litt., 153.

Whether the appointment is made on the petition of the infant or that of the complainant, the duty and responsibility of the guardian are the same. When procured in the former mode the statute expressly requires the consent. Sec. 4829 *Comp. L.*; See precedents, 2 Barb., Ch. Pr.; *Hoff. App. No. 66*.

When the appointment is made, however, on the application of the complainant, the statute is silent, and the precedents in New York, where the statute was similar, do not show consent, and it is said to be unnecessary when an officer of Court is appointed, which is usually the case, because it is made his duty to act by the rules of Court. 1 *Van Santo Ch. Pr.*, 154; 1 Barb. Ch. Pr., 85; *Chan. Rule* 143; *Sup. Co. Rule* 61.

We have no such rule, but the authority of the Court over its officers is as full in an individual case to require the performance of such a trust as to make a general rule applicable to all cases. See Sec. 3475, *Comp. L.* This power is not abridged by the statute authorizing the Supreme Court to make rules governing the practice, except on subjects covered by rules so made. Hence the acceptance of such a trust should be implied from the fact of appointment.—The performance of it is exacted as a duty, and there is no option to decline.

After the appointment it was the duty of the guardian to examine into the circumstances of the case so far as to enable him to make the proper defence when necessary for the protection of the rights of the infant. 1 Barb. Ch. Pr., 85. And he is liable for damages resulting from his neglect to do so. 2 *Paige*, 304. If it appear on such examination that there is a clear case against the infant, he may decline to bring proceedings in the cause. *Levy vs. Levy*, 3 *Mad.*, 131, 245. In the absence of any showing to the contrary, it should be presumed that the guardian refrains for sufficient reasons.

It is usual even where there is no defence to file a general answer for the infants, submitting his right to the judgment of the Court.

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But since the filing of such an answer where there is no defence dispenses with no proof to establish the facts stated in the bill, (*Wright vs. Miller*, 1 *Sandf. Ch., R.*, 103, 118; *Baker vs. Woods Id.*, 129, 134;) it is merely formal and though it may be irregular for the complainant to proceed without, (3 *Eder*, 414,) yet unless some wrong is done, the Court will not vacate the proceedings after a decree and sale, (See *Kellogg vs. Putnam*, 11 *Mich.*, 344,) but will permit the answer to be filed *nunc pro tunc*. *Scott vs. Clarkson*, 1 *Bill*, 277.

There is no proper showing of merits. *Walk. Ch., R.*, 385.— There is no reason given why the guardian *ad litem* did not prepare an answer showing the defence if any there is, and present the petition accompanied with that answer. It can not be presumed that he declined or disclaimed the office.

3. The reference to the commissioner of Oakland County is not irregular.

Commissioners act as Masters in Chancery in executing such an order. That office, in this State, was local only as to the territorial limits within which the Master was required to act. *R. S.* 1846, p. 426, Sec. 55.

The new Constitution having abolished the office, the Legislature in 1851 enacted that the several Circuit Court Commissioners within their respective counties, should be competent to discharge all such duties as had heretofore been performed by Masters in Chancery in this State, according to the practice in chancery proceedings, and all such other powers as should be conferred upon them by the several Circuit Courts within the jurisdiction, and under the orders of which they might act. 2 *Comp. L.*, Sec. 3981.

Rule 92 provides for entering an order of course, referring it to a commissioner to take proofs and compute the amount due preparatory to hearing the cause. Unless, therefore, there is a limitation of jurisdiction implied from the history of the office, or the foregoing statutory provisions, so that no commissioner can be named in or execute such an order, except when made by the Court sitting in his own county or as substitute, this rule is sufficiently general in its terms to allow any commissioner in the State to act.

In England, whence we derive the office, it existed as early as we have any memorial of the Court. The twelve Masters, including

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the Master of the Rolls, were assistants of the Lord Chancellor, and no more confined in respect to territory than the Court itself. See *Intro. to Mas. in Chan., by Hoff.*, p. 18, 1 *Smith. Ch. Pr.*, 9, 16.

In New York, while the chancery system was in vogue, Masters were appointed, and required to reside in the county for which they were appointed. 1 *N. Y. R. S.*, 101, Sec. 9; 1 *Hoff. Ch. Pr.*, 21. The statute defining their powers was like ours, except that it did not contain the clause "within their respective counties," which is immaterial to our present inquiry. Rule 99, of the N. Y. Chancery, directed that an order when entered of course should be executed by a Master *residing* in the same county with the solicitor who obtained the order, unless another should be agreed upon.

If the reference was by a special order or decree, it might be made to any particular Master by name, or to any Master in a particular county or place, in the discretion of the Court, thus recognizing no restriction to the county or Circuit where the Court sat.

Petition denied.

ALEXANDER MACROBERTS AND WILLIAM NESBIT *vs.* ALVIN EASTMAN.

Where the defendant pleads in abatement the mis-joinder of the plaintiffs, the plaintiffs hold the affirmative and must begin.

An agent may bind an undisclosed principal, and may so negotiate for him as to make him a party to a contract without naming him.

Where issue is joined upon a plea in abatement, and the decision is adverse to the plea—whether *interlocutory* judgment should be entered and plaintiff's damages be *subsequently* assessed, *quere*.

Saginaw Circuit, in Chancery.

[This case was decided prior to the adoption, by the Supreme Court, of the recent rule as to pleas in abatement.]—*REP.*

Grout & Hanchett, for Plaintiffs.

Sweet & Foote, for Defendant.

By the Court, SUTHERLAND, J.—This is an action of assumpsit,

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and the defendant pleads in abatement the misjoinder of the plaintiffs.

On this issue the plaintiffs hold the affirmative and must begin, *Davis vs. Evans*, 6 Car. & P., 619. The direction on the trial was different, but neither party suffered any prejudice.

The contract sued upon was a verbal contract, negotiated by an agent, (Grout,) or by MacRoberts, one of the plaintiffs. The time and circumstances satisfy me it was concluded with Grout. He had written instructions which clearly import that both plaintiffs were in fact to be interested in the transactions. Grout testifies very confidently that in the negotiation with the defendant, he disclosed to defendant that MacRoberts was not the only person concerned, but did not disclose who else was represented by him. This is denied by the defendant. The fact whether there was such a disclosure or not is immaterial. An agent may bind an undisclosed principal, and may so negotiate for him as to make him a party to a contract without naming him. *Taintor vs. Pendergrast*, 3 Hill. 72; *Hogan vs. Sherb*, 24 Wend., 458; *Grogan vs. Wade*, 2 Starkie, 448.

It therefore being shown that the plaintiffs were partners, and the contract in question made for them, they were entitled to sue on it jointly, and the defendant's plea is untrue.

Judgment final must therefore be rendered in favor of the plaintiffs for their damages to be assessed. *Green's Pr.*, 161; 3 Wend., 258; 6 Id., 649; 19 Id., 527; 2 Wils., 367.

The question has arisen in my consideration of the case, whether interlocutory judgment may be rendered for the plaintiffs and damages be subsequently assessed, and then final judgment rendered.

In *EECHERN vs. LE MAITRE*, 2 Wils., 367, this course was not permitted, but for a reason which has now ceased to have any force, namely, the loss of the remedy by attain for a false or erroneous verdict. In *Haight vs. Holley*, 3 Wend., 258, after the jury had determined the fact in issue on the plea in favor of the plaintiff, he proceeded before the same jury to assess damages. In *Clement vs. Lewis*, 7 Eng. C. L. R., 740, judgment final or an inquisition of damages was reversed, because the jury that tried the issue on the pleadings had not assessed the damages. This occurred in 1822, though it was suggested that the writ of attain had been obsolete for nearly two centuries.

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The practice of setting aside verdicts upon motion had superseded the harsh remedy against the jury, and Blackstone had seen but few instances of attain in the books later than the 16th century.—3 *Black. Com.*, 405. But it was not abolished until the reign of Geo. IV. *New Am. Cycle*, title *Attaint*.

Where the question of the amount of damages arises with the question of the right to damages, they should undoubtedly be decided together in one verdict or decision, but if the inquiry in respect to the amount follows the decision of the right, or may follow it as the subject of a second finding, especially if conducted before the Court without a jury, there is great propriety in allowing it at a different time to suit the convenience of parties. To do so there should be an interlocutory judgment to proceed upon. The plaintiffs, at their option, may adopt that course in this case.

EMMA LEORA GRIFFIS AND THERON GRIFFIS, Infants, by their next friend, AND AUSTIN GRIFFIS, vs. SAMUEL STODDARD, MAJOR F. LOCKWOOD, DANIEL D. BARNEY, MARIETTE BARNEY, SMITH M. BROWN, JOHN BENNETT, ANDREW S. TAGGETT, JOHN PIKE AND ALANSON GRIFFIS.

Bill of complaint multifarious.

It is a general rule that equity has concurrent jurisdiction with the courts of law in cases of fraud; but not to impeach a will for fraud or incompetency of the testator, though the court of equity may retain a bill involving such a question, to obtain the decision of the proper court, and then to decree accordingly.

Where there is concurrent jurisdiction, the right to maintain jurisdiction attaches to the tribunal that first exercises it.

Probate Courts have jurisdiction to try all questions touching the validity of wills of personal as well as real estate.

The judgment of every court on matters within its jurisdiction, is conclusive on every other court.

Saginaw Circuit, in Chancery.

General demurrer to bill by defendants, Stoddard, Lockwood and Barney.

By the Court, SUTHERLAND, J.—It appears by the bill that

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Julia W. Griffis, died on the 14th day of May, 1863, possessed of certain real estate situate in the county of Saginaw. That on the 14th day of February, 1863, she made a will disposing of said real estate, and on the 6th of April following, a codicil. That since the death of the testatrix the will and codicil have been proved and allowed by the Probate Court of said county, and letters testamentary issued to defendant, Stoddard, the executor therein named.

The infant complainants claim as heirs-at-law, and Austin Griffis under a conveyance from defendant Griffis, of his alleged estate by the curtesy as the husband of the said Julia W. Griffis. As to defendants Stoddard, Brown, Bennett, Taggett and Pike, the complainants seek to have their respective claims as heirs, and by the curtesy, established, and to avoid the will, on the ground of fraud and incompetency of the testatrix, and the codicil on the ground that the testatrix did not execute it, and that it was not seasonably filed in the Probate Court to render effectual certain eleemosynary bequests. *Comp. L.*, § 2032.

The other defendants are not alleged to claim under the will, but under a lease executed in her life-time by Mrs. Griffis and her husband, and which complainants ask to have set aside for uncertainty, and because of her alleged lunacy when it was executed.

Austin Griffis states no case for relief in his own behalf against the defendants claiming under the will, and has a perfect remedy at law, if any where, on the case stated against the other defendants.

He has no interest in the question relating to validity of the will and codicil. They only affect the claim of the other complainants.

The bill is manifestly multifarious. *Story's Eq. Pl.*, Sec. 271; 1 *Dan. Ch. Pr.*, pp. 395, 396, 397; *Swift vs. Eckford*, 6 *Paige*, 22, 23.

It is a general rule that equity has concurrent jurisdiction with the courts of law in cases of fraud. But it does not exist to impeach a will for fraud or incompetency of the testator. 1 *Story's Equity*, Sec. 184 and note; *Adams' Equity*, pp. 175, 248; 15 *Ohio*, 345; *Bennett vs. Wade*, 2 *Atk.*, 324; *Gingoll vs. Horne.*, 9 *Sim.*, 539; *Jones vs. Frost*, 3 *Madd.*, 1; *Jones vs. Jones*, 3 *Meriv.*, 171; or at all events not unless it appears that there is not a perfect remedy at law. *Brady vs. McCosker*, 1 *Comsk.*, 214.

It seems the Court may retain a bill involving such a

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creed accordingly. *Colton vs. Ross*, 2 *Paige*, 396; *Van Alst, vs. Hunter*, 5 *John. Ch. R.*, 148; *Gaines vs. Chew*, 2 *How.*, (U. S.) 619, 645; *Muir vs. Trustees*, 3 *Barb. Ch. R.*, 477.

If the case of wills did not form an exception to the concurrent jurisdiction of equity, this Court would have no ground of jurisdiction to interfere after another court having a like jurisdiction had either taken cognizance of the case or decided it. Where there is a concurrent jurisdiction, the right to maintain jurisdiction attaches to that tribunal that first exercises it. *Stocton vs. Williams*, 1 *Doug.*, 565.

The Probate Court has a clear acknowledged jurisdiction to try and decide all questions touching the validity of wills of personal, as well as of real estate. Chap. 92, *Comp. Laws*.

The judgment of every court on matters within its general or limited jurisdiction, whichever it may be, is conclusive and binding on every other court. 1 *Greenl'f Ev.*, Secs 522, 525, 550.

The determination of the Probate Court allowing the will and codicil in question is of this conclusive character. This effect not only follows from the general principle just stated, but is directly declared by the statute. § 2844, *Comp. L.*

The demurrer allowed.

DWIGHT G. HOLLAND AND JANE E. DERBY *vs.* OLIVER STEWART.

H. Joslin, for Plaintiffs.

Wm. A. Lewis, for Defendant.

By the Court, SUTHERLAND, J.—The defendant purchased lime of the plaintiffs, assuming to be the agent of one Thos. K. Mosher. The plaintiffs on his representation charged the lime to Mosher, but on his denying the agency of the defendant, plaintiffs communicated the fact to defendant, and he promised to pay for the lime. Defendant was not authorized to purchase the lime on the credit of Mosher.

The defendant is himself liable. Not having authority to bind the person in whose name he assumed to act, he is liable himself as principal. 19 *John*, 63, 558; 13 *Id.*, 58, 307; 1 *Cow.*, 536; 7 *Cow.*, 454.

Judgment for plaintiffs.

 KEELER vs. DELANO.

EGBERT E. KEELER vs. HUGH DELANO.

Is an appeal on a promissory note secured by a chattel mortgage, the defence being want of consideration for note and fraud in obtaining mortgage, when the mortgagee had sold the mortgaged property upon due public notice, and the verdict indicated that the jury had given the defendant the value of the property mortgaged, *Held*, that the verdict was against law, and there being no objection to the charge of the Court, a new trial was granted on payment of costs.

Latham Circuit, October, 1870.

Geo. M. Huntington, for Plaintiff.

M. D. Chatterton, for Defendant.

Motion for new trial.

By the Court, WOODRUFF, J.—This was an action brought on a promissory note given by defendant, J. D. Wheeler Co., October 12, 1867, for \$125, payable September 12, 1868, with interest at ten per cent, and secured by a chattel mortgage executed by defendant and wife on various articles of personal property, some if not all of which were by law exempt from execution.

With his plea of the general issue, the defendant gave notice of set off, want of consideration and recoupment.

The actual defence sought to be made on the trial was want of consideration, the taking of other property than was admitted to have been taken on the chattel mortgage, the amount so admitted to having been received upon the security being \$22.

The verdict of the jury was for the defendant for the sum of \$40.

There was some proof going to show that other property of the defendant had disappeared, but no proof that it was taken or came to the hands of the mortgagees or the plaintiff, and that the property sold on the mortgage was of more value than what was realized by the sale, but there was no showing and no claim that the sale itself was not conducted fairly.

It is manifest from this statement of the case as made on the trial, that the jury in arriving at their verdict must have charged the defendant with the property taken on the chattel mortgage without regard to the sale, since this is the only reasonable theory of their verdict.

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If they did so, then the verdict is against law. The most they could do, even on their supposition that they found the mortgage fraudulent, was to give the proceeds of the sale of the property as money had and received to the defendant's use.

The defendant, had he brought an action of assumpsit for the taking of the cow, waiving the tort, as perhaps he might, could only have recovered the amount realized by the sale, on the part of the mortgagee. He would not have recovered the value of the animal in that form of action. He certainly could do no more by the other form of waiver to which he has had recourse as a defence or set-off in assumpsit. *Hunter vs. Prinsch*, 10 *East.*, 391.

The verdict must therefore be set aside and a new trial awarded. on payment of costs, which is the established condition of a new trial where the verdict is against law, and the charge was not incorrect. See *Gr. & Wat. on N. T.*, 1, 601; *Bank of Utica vs. Ives*, 17 *Wend.*, 51; *Marvin vs. Fay*, 1 *E. D. Smith*, 107.

ISAAC ALTMAN vs. JAMES K. JOHNSON AND ABRAHAM WHEELER.

Where a suit is taken from the Circuit to the Supreme Court and the judgment rendered below is affirmed, execution upon the judgment originally obtained in the Circuit Court will issue from that Court, unless there is something in the order or judgment of the Supreme Court that plainly includes the judgment in the Circuit Court.

Lenawee Circuit, January, 1871.

Judgment upon report of referee in favor of the defendant for costs, removed to the Supreme Court by the plaintiff upon writ of error and judgment below affirmed.

Defendants filed certified copy of the order of the Snpreme Court affirming the judgment below, and took an execution from this Court to satisfy the judgment obtained therein.

Plaintiff moves to set aside the execution because, as he claims,

1. The execution should have issued from the Supreme Court.
2. The record has not been returned from the Supreme Court.

No remittitur filed in Circuit Court.

A. L. Millard, for Plaintiff, cites *Tidd's Practice, Am. notes*, 994, 995; 2 *Wendell*, 239; 2 *Revised Statutes, N. Y.*, § 26, *Ed. of '29*;

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2 *Bouvier's Law Dictionary*, 445 ; 3 *Hill*, 632, 633 ; 1 *Wendell*, 25 ; 2 *Burrill's Practice*, 162 ; 3 *Id.*, Sec. 227 ; 2 *Tidd's Practice*, 911, 1176 ; 2 *Compiled Laws*, Sec. 5336 ; 3 *Bacon's Abridgement*, 361, 362 ; 3 *Johnson*, 443.

C. A. Stacy, for Defendant, cites Supreme Court Rule 11 ; 2 *Compiled Laws*, Secs. 4442, 5333.

By the Court, PRATT, J.—Supreme Court Rule 49, provides that final process shall be issued upon a judgment or decree of that Court. It cannot issue upon a judgment or decree of a Circuit Court. Unless the judgment below was specially included in the judgment of the Supreme Court, execution could not issue for the recovery of the same from the latter Court. The case of *Lester vs. Sutton*, 7 *Mich.*, 329, which was a case of reversal, decides that judgment "for costs to be taxed," included only the costs of the Supreme Court. It is true the case is not exactly parallel, but in any case I think judgment in the Supreme Court "for costs to be taxed," would only include the costs of that Court.

When a case is taken up to the Supreme Court on writ of error, the original record, under our practice, is not sent up—only a transcript. *Supreme Court Rule 11.*

The writ of error does not stay an execution from the Circuit Court unless a bond is given to defendant in error, showing that the Circuit Court still has control of the judgment in that Court.

Compiled Laws, Secs. 5333 and 5335, further provides that in case the bond is filed and due notice given, no execution shall issue thereon during the pendency of the writ of error, leaving the inference that an execution may issue as soon as the pendency of the writ of error is determined.

Section 5336 of the *Compiled Laws*, further provides that the proceedings upon writs of error shall be according to the course of the common law, as modified by the practice and usage in this State, and such general rules as shall be made by the Supreme Court.

The practice at common law is very clearly pointed out in *Tidd's Practice*, 994 and 995. Where a case is taken from one court of record to another the execution issues out of the court where the record is. When a case was taken from the Common Pleas to the King's Bench, the original record was sent up and in that case execu-

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tion issued from the King's Bench. But when a case was taken from the King's Bench to the Exchequer Chamber or House of Lords, a transcript only of the record was taken up from the King's Bench, and the execution issued from the King's Bench, *where the original record was*. A case that was affirmed in the Exchequer Chamber, is reported in *Palmer's Reports*, that was issued in the time of James the First and Charles the First, long before our Revolution. A like case is reported from the House of Lords, in *Corper's Reports*, in the time of George the Third, shortly after our Revolution. I am not aware of the existence of any practical usage or Supreme Court rule in this State changing the common law practice. On the contrary, so far as I have had any experience, it has been the universal practice in this State, for the execution, in cases of this kind, to issue from the Circuit Court. The practice in New York, as fixed by Rule 28, 6 *Hill*, 633, is the common law practice slightly enlarged upon, in that it provides for the recovery of costs in both the Court of Appeals and the Supreme Court, in the latter Court. The practice in Virginia is fixed by statute, and follows the common law practice substantially. 1 *Robinson's Practice*, 673.

In the State of New York, by Rule 27, found in 6 *Hill*, 632, it is true, the remittitur of record is made to consist of the writ of error and the transcript of the record, all of which must be returned to the Supreme Court, but in the absence of any such rule in this State, the order of the Supreme Court as made in this case is sufficient for this Court to act upon. There can be no mistake as to this suit and the identity of the parties to the suit any more than if the writ of error and the transcript were all returned. The original record is in this Court and has remained here all the time. The Court knows full well what to act upon. The practice in our State will differ from that of the State of New York in this. There, an execution for costs in both the Court of Appeals and the Supreme Court issued from the Supreme Court. Here an execution must issue from each court upon the judgment made therein. There is nothing in this case indicating that the judgment below is to be included in the judgment of the Supreme Court.

The motion is denied.

WHEELER vs. TOOF,

CARLTON WHEELER vs. S. GRIDLEY TOOF.

A defendant who fails to deny the execution of a promissory note, at the time of pleading, will not be permitted to question it at the trial, even though there may appear, on the face of the instrument, some indications that it may have been altered.

At the time of dedicating a church, A promised verbally, to pay \$50 towards liquidating the indebtedness of the Society and to enable it to complete its church. B, a Trustee of the Society, had advanced moneys for the Church, and A, in lieu of his promise to contribute money to the Society, gave his note for \$50 payable to B or bearer. In a suit on the note, *Held*, that the consideration was sufficient, and that B might recover in his own name.

Van Buren Circuit, 1871.

This action was commenced before a Justice of the Peace, the plaintiff declaring upon a certain promissory note executed by the defendant, payable to the plaintiff or bearer, and dated December 2, 1868, for the sum of \$50, with 10 per cent. interest, due October 1st., then next following.

Judgment was rendered in the Court below against the defendant, for the face of the note with interest.

The defendant appeals from that judgment. At the trial in this Court, the plaintiff produced the note and offered the same in evidence. The defendant's counsel objected to the introduction of the note, on the ground that it had been changed since its execution, by the addition of the words "with ten per cent. interest"—that from the face of the note this addition was apparent.

No affidavit denying the execution of the note had been filed, the objection was overruled, and the note was read in evidence.—The plaintiff then introduced a witness who testified to the amount of interest accrued upon the note, and thereupon rested his case.

The defendant then testified in relation to the circumstances of giving the note—that at the time of the dedication of the First Presbyterian Church of Decatur, the society desired to raise funds to liquidate the indebtedness which had accrued in the building of the Church. In referring to this matter the defendant said :

"There was a statement made that the Society was about \$1,500 in debt, and they wished to raise funds to liquidate the debt. On the evening of that day I told them they might count on me for \$50. I told the Society so.

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"I was in the gallery. I told Mr. Wheeler I could not pay that money then; he said that was all right; he said I should come down to his office sometime and put it in shape of a due bill—something of that kind. I went there some time afterward, and he put it in writing, and I signed it."

The plaintiff, it appears, was one of the Trustees of the Society, who, by way of rebutting, testified that at the time of the dedication "we called for volunteer subscriptions to liquidate the debt; various parties stated what they would give; they also took up a contribution in money, and parties who were not prepared to pay money wrote the amount with their name upon a slip of paper and dropped that instead of money. The defendant was there and proposed to give \$50. After services he came forward and said he was not prepared to pay it then; he would like to pay it some time in the Fall I says to him, "you had better come down and see me, and we'll fix it up; give me your note for it." He said he would do so. I afterwards saw him and put it in writing, and he signed it."

Wm. H. Nearpass testified: "The statement at the time of the dedication, was, as I understood it, to pay the indebtedness and to finish up the house. I could not say positive whether the word *finish* was used."

Witness Bray, testified that at the time of dedication, Elder Toof said there was some work yet to be done. It was said in this way: "When the church was completed" or "would be completed" (it was not quite done) "there would be an indebtedness of about \$1,500, and this subscription was taken to pay that indebtedness and to finish up the church."

Upton & Tucker, for Plaintiff.

Foster & Fiehl and *N. A. Balch*, for Defendant.

By the Court, BROWN, J.—From the testimony in the case, the Court finds the following facts:

1. That the note in question has not been altered since its execution.
2. That the note in question was given as a promise to pay \$50, to assist the First Presbyterian Church of Decatur to pay its indebted-

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edness incurred and to be incurred in the construction of their church.

3. That the plaintiff at the time of taking the note had advanced funds of his own to pay for labor and materials in the construction of the church, and that on taking such note he credited the church with the sum of \$50.

While it is true that the words in the note relative to interest appear to be written in ink a shade darker than the body of the note, it does not appear different from that of the signature.

The plaintiff has not denied the execution of the note, as required by the rule, to entitle him to question its validity.

It is claimed on the part of the defendant that there was no consideration for the note—that if it was the understanding and agreement of the defendant that he was to pay money for a past indebtedness, and no additional obligation was incurred by reason of such promise or on the faith thereof, the promise would be but a mere *nudum pactum*; and in support of this position the following authorities were cited: 1 *Gr. on Ev.*, § 564^{et. seq.}; *Sheldon vs. Hawes*, 15 *Mich.*, 517; *Wilde vs. Armsby*, 6 *Cush.*, 314; 2 *Par. on Con.* (5th Ed.) 721, 722, note y; 1 *Par. on Con.*, 453; *Limerick Academy vs. Davis*, 11 *Mass.*, 112; 1 *Comst.*, 581; 9 *Mass.*, 252; 2 *Pick.*, 578; *Edw. on Notes and Bills*, 324.

It was contended at the argument that the promise of the defendant made at the church was without consideration, and that therefore his subsequent promise embodied in the note to the plaintiff, being made in lieu of the first promise, cannot be enforced; and the case in 5 *Pick.*, 390, is relied upon in support of the proposition.

The counsel for the defendant further insisted that at most the obligation incurred by the defendant was but a moral one, and that such obligations were not sufficient to support an express promise in writing, and the case of *Mills vs. Wyman*, 3 *Pick.*, 207, is cited as authority.

A consideration and examination of the authorities upon the questions thus raised is full of interest. These authorities are far from being uniform, and the grounds upon which the cases have been decided are so varied as to lead to some confusion, and unless critically examined many of them would tend to lead us far from correct principles. Some of the cases hold that a promise of one subscriber

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to pay money is a sufficient consideration for a similar promise by another, while others deny the force of subscriptions as mutual considerations. Concerning this latter class of cases, our own Supreme Court in *Underwood vs. Waldron*, 12 Mich., 89, say: "The cases which have denied the force of subscriptions as mutual considerations, are usually cases where no payee is named or designated, or where the one designated is either incapable of acting, or does not assume and is not bound to act;" and the cases in 9, 11 and 14 Mass., are cited as cases of this character. And where this difficulty has not existed it has been recognized repeatedly that it is a sufficient consideration that others were led to subscribe by the very subscription of the defendant. 5 Pick., 506; 9 Cush., 537; 4 N. H., 533; 6 N. H., 164; 24 Vt., 189; 6 Pick., 427.

In the case referred to in 12 Mich., Judge Campbell says, that "objections for the want of parties are frequently classed with objections to the consideration; and parties have been discharged upon grounds by no means clear or intelligible. Any extended criticism of the cases would be more curious than profitable, as the whole subject must be determined by the rules governing ordinary agreements."

If we are to apply in this class of cases the same tests that we do in an ordinary agreement, I can see no difficulty. If in the examination of the various authorities upon this question we bear in mind the distinction between the contract and the consideration, and draw clearly the line between the different forms of promises, we shall be able to avoid the confusion into which we should otherwise be drawn by a contemplation of the cases referred to.

Is a church valuable in a legal sense? Is the citizen benefited by these promoters of civilization? by the institutions that tend to make him secure in his person and his property? In the case of *Underwood vs. Waldron*, the learned Judge says: "We cannot hesitate to hold that a school or church, or other similar institution, which we are anxious to have built, and promise to pay for is "valuable" to them in a legal sense. In most cases there is a pecuniary value in the enhanced prices of neighboring property. But, apart from this, any worthy purpose for which men generally are willing to expend money, must be regarded by courts as worth money, when it is promised. We know of no safer test to apply to human transactions."

To the same effect, see 6 Mass., 42; 14 Id., 172; 15 Mich., 237; 6

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Pick., 431 ; 12 *Pick.*, 129 ; 7 *N. Y.*, 349. Most of these cases hold that a moral obligation is a sufficient consideration to support an express promise.

It was urged at the argument that the note was, if it had any validity, the property of the Church, and that therefore Wheeler could not recover upon it. It would be a sufficient answer to this objection that one who holds paper payable to bearer, for another, may sue in his own name and his want of interest is no objection. 7. *Coven*, 174 ; 11 *Jackson*, 52 ; 5 *Wend.*, 257 ; 3 *Johnson's Case*, 264 ; and it has even been held that the fact that the holder and owner of a negotiable note prosecutes it in the name of a stranger, without his knowledge or consent, is no bar to a recovery. 15 *Wend.*, 640 ; 25 *Id.*, 411.

Upon this question of consideration the distinction between inducement and consideration must not be overlooked. It is not necessary that the consideration should go to the promisor. A consideration to a third party may be an inducement to a person to give his note ; and in such case the promise is just as binding as though the promisor had received the benefit. A is indebted to B ; C to discharge B's indebtedness gives A his own note, and A thereupon discharges B. Here the consideration was for the benefit of B, and was an inducement for C's promise.

In the case before us, the Church Society had incurred an indebtedness and subsequently made further expenditures. To assist the Society in the payment of its obligations and to enable it to complete its church, the defendant promised to pay \$50. The Society was indebted to the plaintiff for moneys advanced to him. The defendant gave his note to the plaintiff, and the plaintiff credited the Church Society with \$50. The Society received the consideration. With this view of the case it will be seen that it is of but little consequence whether, as a matter of fact, the defendant has ever availed himself of the benefits he might receive from the civilizing and enlightening influences of the Church.

Let judgment be entered for the plaintiff for the sum of \$60 90, that being the amount of the note with interest

THE MICHIGAN NISI PRIUS.

MARCH, 1871.

MARY KEMPSEY, Appellant, *vs.* NANCY MAGINNIS *et. al.*, Appellees.

Proof of will—order of proofs.

The law requires that a person in order to make a valid will, should have a sound and disposing mind and memory. The mind need not necessarily be in its full vigor and power, but its faculties should be, so to speak, in working order, with an active power to collect and retain the elements of the business to be performed, for a sufficient time to perceive their obvious relation to each other.

In determining mental capacity, the jury may look at the provisions of the will, may consider the history and relations of the testator, his previous conduct and language in relation to those related to or acquainted with him, and his previous determination as expressed by him as to what disposition he intended to make of his property, as well as the testimony of witnesses who swear to his actual mental condition as witnessed by them at the time of making his will; and may consider the testimony of experts whose opinions are predicated upon certain assumed facts, provided such assumed facts are proved.

The testator need not, in terms request the witnesses to attest the will. It is immaterial how the request is conveyed to the witnesses, if it appear that such request was the free and intelligent act of the testator.

By improper and undue influence, is meant the dominion acquired over the mind of another which prevents the exercise of discretion and destroys free will.

Admissions made by legatees or others, after the execution of the will, as to the sanity of the testator, are not admissible as bearing upon the question of mental capacity.

Conflict in testimony—Rules as to weighing evidence, discussed.

Kalamazoo Circuit, March, 1871.

Sherwood & Edwards, for Appellant; *C. S. May*, of Counsel

Wm. Fletcher, for Appellees; *D. Darwin Hughes* and *H. F. Severens*, of Counsel.

Charge of the Court, BROWN, J.—Gentlemen of the Jury:—

A certain instrument in writing, purporting to be the last will and testament of Thomas Patterson, was admitted to probate in the Probate Court of this county. An appeal has been taken from the

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decree of that Court, and the issue now is as to the validity of that instrument.

The contestants claim that the will is invalid for these reasons :

1. That the will was not executed and attested in the manner required by law; that the mark at the end of the will was not declared by the testator to be his signature, and that the witness, Abbott, was not requested by the testator to sign the will as a witness.

2. That when the will was executed the testator was not of sound mind and memory; that he was attacked on Tuesday or Wednesday, the 12th or 13th of December, 1865, with *pleuro pneumonia*, of which disease he died on the evening of Saturday, the 16th; that the progress of the disease was such that on Friday, his right lung was completely hepatized, and that the disease was then in its first and second stages in the left lung, and that the effect of such disease at that time was to render the testator incapable of transacting any business requiring an exercise of the judgment, the reasoning faculties and a consecutive continuation of thought; and that he was then incapable of planning and executing such a paper as is offered as his will.

Every person of twenty-one years of age and upwards, of sound mind, may devise, bequeath and dispose of his property by his last will and testament in writing.

The validity of the instrument under consideration depends upon the existence of the following facts :

1. That Patterson was, at the time he is alleged to have executed the instrument twenty-one years of age or upwards.

2. That he had sufficient mental capacity to make the same.

3. That it was signed by him or by some one in his presence and by his express direction.

4. That it was attested and subscribed in the presence of the testator by two or more competent witnesses.

In the first instance it devolves upon the proponents of the will to establish all these facts *prima facie*; and by *prima facie* we mean such evidence as satisfies the mind, unless rebutted.

When the proponents have presented evidence which they deem sufficient for this purpose, they rest their case, whereupon the contestants offer their proofs tending to invalidate the will. Such evidence constitutes the contestant's case. And the proponents then

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offer evidence tending to rebut that introduced by the contestants. The contestants then introduce testimony tending to impeach that offered by the proponents; but are not permitted to go into any new matter in support of their original case.

This is the third week of the trial of this cause, and now after having patiently listened to the evidence and arguments of counsel, you are to say whether the facts are such as, when the law shall be applied to them as directed by the Court, the instrument under consideration embodies the legal declaration of Thomas Patterson's intentions of what he willed to be performed after his death.

No particular form of words are necessary to make a valid will. Words are used to express ideas and intent. And if the idea and intent may be gathered from the words, that is all that is necessary in this particular. The law does not require of a testator, in order that he should make a valid will that he should dictate the form and framework of the instrument; but the substance must be his, and he must declare it to be his last will. As to the signature it is sufficient if it be by a cross or other mark by the testator as and for his signature.

You are to find from the evidence whether Thomas Patterson was of lawful age and of sound mind; whether in making what is claimed as his will he acted freely and not under restraint or was subjected to undue and improper influences. In short, whether it was made, signed, published and attested with the requisites and in the manner prescribed by law.

Does the paper here offered and propounded for probate contain and embody the designs and intent of Patterson as to the disposition of his property?

Upon the question of mental capacity—as to what degree is necessary to enable a person to make a valid will—I advise you in the language of my learned brother, Judge Littlejohn, who presided at the former trial of this cause: “Aside from the requisite formalities in the making of a will, the law defines the requisite soundness or mental capacity of the testator in this wise: A will is not valid unless the testator not only intends of his own free will, to make such a disposition, but is capable of knowing what he is doing, of understanding to whom he gives his property and in what proportions, and

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whom he is depriving of it as heirs, or as devisees under the will he makes.

"If a testator has mind enough to know and appreciate his relations to the natural objects of his bounty, and the character and the effect of the dispositions of his will, then he has a mind sufficiently sound to enable him to make a valid will.

"If the jury should be satisfied that though the testator's mental powers had become enfeebled through mental decay or disease, he still had disposing mind, and if you find the evidence sufficient to show that he fully understood and intended to make the disposition which he has made of his property, then the will must stand, as touching the question of mental capacity or soundness, however unnatural or unjust its provisions may appear. Such are the tests the law prescribes for the guidance of courts and juries."

Upon this same question, our own Supreme Court in passing upon this very case, (20 *Mich.*) uses the following language:—
"But what degree of mental capacity is necessary to enable a testator to make a valid will, to what extent and with what degree of perfection he must understand the will and the persons and property affected by it, or to what extent his mind must be impaired to render him incapable, is a question of law, exclusively for the Court, and with which the witnesses have nothing to do. And it is a question of law of no little difficulty, which calls for the highest skill of competent jurists, and upon which the ablest courts are not entirely agreed. The rule settled by the weight of authority undoubtedly is, that a less degree of mind is requisite to execute a will than a contract; and though the testator must understand substantially the nature of the act, the extent of his property, his relations to others who might, or ought to be objects of his bounty, and the scope and bearing of the provisions of his will, and must have sufficient active memory to collect in his mind, without prompting, the elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least, their obvious relations to each other, and be able to form some rational judgment in relation to them (*Parish Will Case*, 25 *N. Y.*, 9); yet it is quite clear, from the great weight of authority, that he need not have the same perfect and complete understanding and appreciation of these matters, in all their bearings, as a person in sound and vigorous health of

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body and mind would have. Nor is he required to know the precise legal effect of any provision contained in his will, for upon this, even the draftman of the will, though competent, and in full possession of all his faculties, may often fail; and even the best lawyers may not be able to pronounce with certainty till the question is settled by judicial authority."

The term "sound mind," in the statute, does not mean that the testator shall have the same command of his mental faculties that he may have when in health. The law recognizing that wills are often made in *extremis*, when the bodily powers are breaking and the mental faculties are enfeebled, only requires that the testator shall retain so much of his mental power as will enable him to understand his relations to those who would be the natural objects of his bounty, the property he wished to distribute and the manner in which he intends to distribute it.

Upon this question I advise you as requested by proponent's counsel:

"That even if the jury are satisfied that the mental powers of Patterson had become enfeebled or disturbed by disease at the time he made the alleged will, still if they find from the evidence that he did yet fully understand and intended to make the disposition which he made of his property, then the will must stand as touching the question of mental soundness or capacity."

You are instructed "that if in the present case you should find from the evidence that Patterson on the day he made the alleged will was delirious, or that his mental faculties were otherwise obscured by the disease from which he was suffering, still this would not necessarily prevent his having sufficient capacity in law to make a will. Delirium or obscuration of the mental faculties by disease must be so complete and so becloud the mind that the testator does not understand the nature of the business in which he is engaged," or does not understand at the time of making the instrument, substantially the act, the extent of his property, his relations to others who might or ought to be the objects of his bounty, and the scope and bearings of the provisions of the will, and does not possess the other qualifications I have already referred to.

The impairing of the mental faculties by the effects of acute disease, such as delirium, or the enfeebling of them from any of the

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causes incident to such disease, must be to that extent which deprives him of the use of his reason and understanding to the extent already intimated. For if this is not the testator's situation although his understanding may be to some extent obscured and his memory troubled, yet he may make his will.

There is an essential difference between the apparently lucid intervals in delirium and in general insanity. In delirium the apparent returns to reason may be real and unquestionable, while those which seem to occur in insanity are delusive, the patient being as really laboring under the power of the malady as in the more distinctly marked periods of its progress; but testamentary incapacity does not necessarily presuppose the existence of insanity in its technical sense. Weakness of intellect, whether arising from extreme old age, from disease or great bodily infirmity, from intemperance, or from all these causes combined, when such weakness disqualifies the testator from knowing or appreciating the nature, effect or consequences of the act he is engaged in, renders such testator incapable of making a valid will. See *Wheaton & Stille, Med. Jur.*, § 12.

The law requires that a person in order to make a valid will, should be of sound and disposing mind and memory. And what we mean by soundness in this connection is, not that the mind should be in its full vigor and power, but that its faculties, its machinery, should be in working order, so to speak, with an active power to collect and retain the elements of the business to be performed, for a sufficient time to perceive their obvious relation to each other.

From these considerations you will perceive that the testator must have intended of his own free will to make such a disposition of his property as is made by his will, and must have been capable of knowing what he was doing, of understanding to whom he was giving his property, and in what proportions and whom he was cutting off from it as heirs who would otherwise have inherited his estate; and was also capable of understanding the reasons for giving or withholding his bounty as to any of them. In short, the testator, at the time of making the will must have been capable of exercising his judgment, his reasoning faculties and a consecutive continuation of thought.

In determining the question of mental capacity, a wide range is always permitted. The jury may look at the provis-

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ions of the will, may consider the history and relations of the testator, his previous conduct and language in relation to those related to or acquainted with him, and his previous determination as expressed by him as to what disposition he intended to make of his property, as well as the testimony of witnesses who swear to his actual mental condition as witnessed by them at the time of executing the will. If a party makes a will contrary to natural justice, this with other facts may be considered. But the mere fact that a will is not exactly according to what our own conceptions of justice would be, is not, of itself, sufficient to invalidate a will, for the reason that sane men are known to disagree in this respect. By "natural justice," we mean that which is founded in equity, in honesty and right.—Natural justice requires that the parent shall care for his children. By bringing them into the world, the parent engages to provide for them. Natural justice requires that the child who has been protected in the weakness of his infancy, should protect and support that parent in the infirmity of his age. There are other relations in the history of every individual out of which obligations grow, but which are so varied and embrace so wide a range that human tribunals cannot and do not attempt to enforce them. And wherever the question is presented as to whether a natural obligation has been created, it can only be by enquiring what honor or conscience dictates. But in determining in a case like this, what conscience dictates, we are not to consider alone the fact that this person or that person is a blood relation of the testator. Even under the civil law, where a parent was not allowed to disinherit his child without giving his reasons therefor—and the law recognized fourteen reasons either one of which was deemed sufficient to absolve the parent from what, without such reason would be deemed an obligation founded on natural justice. In short, the conduct of the child towards the parent was to be considered in determining the question as to whether natural justice required the parent to confer any portion of his property upon the child. Did the child refuse to aid the father and to give him his services, and did he refuse to reverence his authority, natural justice did not require

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the father to treat the child in disposing of his property, any different from strangers.

I have been requested, and so advise you: "That there is a legal presumption raised by the law in favor of the sanity of all men, and although this presumption is not conclusive, still the jury should consider it in weighing the evidence in the case, of which for practical purposes it forms a part." *Aiken vs. Wickerly*, 19 *Mich.*, 502, 3.

As to the publication of the will, I advise you that no formal declaration is necessary. The statute in that particular is sufficiently complied with if the testator by words or actions indicates that he intends the instrument as his will, and desires to have the witnesses attest it as such.

The testator need not in terms request the witnesses to attest the will. It is sufficient if his desire that they should do so is manifested by an affirmative response to a question whether that was his wish put to the testator by another person, as by a subscribing witness, or in any other way by which such desire might be made to appear, provided that it appear that the request was the free and intelligent act of the testator.

One of the grounds upon which the contestant questions the validity of the instrument offered as a will, is that the testator was unduly influenced in making the same.

Influence is proper or improper. Proper influence is that which one person gains over another by acts of kindness and attention, and correct conduct. 3 *Serg. & Rawle.*, 269. Improper influence is that dominion acquired by any person over a mind of sanity for general purposes, and of sufficient soundness and discretion to regulate his affairs in general, which prevents the exercise of his discretion and destroys his free will.—1 *Cox's Cas.*, 355. When the former is used to induce a testator to make a will, it will not vitiate it; but when the latter is the moving cause it will 1 *Hagg. R.*, 581; 2 *Hagg.*, 142; 5 *Serg. & R.*, 207; 13 *Id.*, 323; 4 *Greenl.*, 220; 1 *Paige*, 171; 1 *Dow. & Cl.*, 440; 1 *Speers*, 93. And as to whether any such influence was brought to bear upon the mind of the testator as to prevent the exercise of his discretion and to destroy his free will, is a question for you to determine from all the testimony in

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the case. This, like the question of sanity is to be considered as relates to the mental condition of the testator.

As touching the question of the validity of the instrument offered as a will, something has been said in the argument about the provision relative to the Allegan lands. Upon this point I advise you as requested:

"If the fact be that in this case John Maginnis, the son of James, was dead, leaving a son by the same name, who was living at the time of the testator's making his will, and there was a son of James Maginnis by the name of James Maginnis, and a brother of said elder James, by the name of Henry, then living, but no son of that name, then the jury are instructed that such facts would not make the devise of the Allegan lands void, and such incongruities existing in the will are only important on probate thereof, upon the question of mental capacity."

In this case we have listened not only to the testimony of those who were present during Patterson's illness, and at the time the will was made, but to the testimony of persons denominated as experts in the treatment of disease. These gentlemen have testified as to their opinions predicated upon certain hypothetical or assumed state of facts. To render this testimony of any value, you must find that the assumed facts are real. Upon this point our Supreme Court say: "And as a collection or state of facts assumed, whether few or many, constitute in the aggregate, the basis on which the opinion is asked; if it does not appear that the opinion would be the same, with any of those facts omitted, it necessarily follows, that, if the jury should negative or fail to find any one of the assumed facts, the opinion expressed cannot be treated as evidence, but must be rejected by the jury."

If therefore you should find that in any of the hypothetical, cases proposed to the physicians for their opinion upon the state of facts therein assumed, any material fact or facts are embodied, which are not proved by a preponderance of evidence to have existed in this case, you should entirely disregard and lay out of the case any opinions based by such physicians upon such hypothetical statement, unless it has further been proved

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that such opinions would have been the same in the absence of such fact.

From this it follows that if the hypothetical statement or statements of facts assumed in the questions put to the physicians as the basis of their opinions did not include all of the facts necessary to describe the actual condition of the testator, then such opinions must be disregarded and laid out of the case, unless it has also been proved that the opinions would have been the same if such additional facts had been excluded.

The object of this testimony of experts is to bring to bear scientific knowledge as to the natural, proximate effects upon any or all of the intellectual powers resulting from either deranged physical organic functions, or the nature of the disease; and the authorities recognize the law to be that such evidence may tend to throw some light upon the mental *status* and capacity of the testator. You are to give such weight to this class of testimony as you deem it intrinsically demands. In short, you are, in this case, to weigh it by the effect which it produces on your mind, when opposed to the testimony of those who saw the testator when the will was executed, and during his illness.

I now call your attention to some of the rules pertaining to the evidence by which you are to be governed; and advise you that if you find that there is a preponderance of the evidence in the case in favor of all the conditions requisite to the making of a will, then the jury are instructed that they should return a verdict in its favor; and by preponderance of evidence is not meant preponderance in numbers of the means by which the evidence is furnished, but in their efficacy in producing belief.

As to statements made by parties after the execution of the will, I advise you that you are not to take any declaration, admission or statement which the jury may find to have been made by any person since the death of Patterson as proof of any fact therein stated or implied, and this is upon the ground that any such declaration, admission or statement is not admissible proof of any such fact.

There appears to be some conflict in the testimony. It is your duty, if possible, to reconcile this discrepancy; and in your endeavors so to do you will take into consideration the relative situation of the witnesses at the time of the occurrence about which they testify,

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and you will thus consider their means of knowledge. If, upon a careful and critical examination you find that you cannot believe all the witnesses; if you are satisfied that it is impossible to reconcile their testimony, you will enquire who tells the truth and who is mistaken, or who testifies falsely. In determining this question you will bring to bear the knowledge of human nature and character, which you have learned from years of observation and intercourse with those with whom you have been associated and brought into contact. You will consider the appearance of the witnesses on the stand, their apparent anxiety or indifference. You will also consider the interest of the witnesses in the case, their relationship to the parties—whether from all the circumstances you believe any witness was influenced by either party in giving his testimony.

By a provision of our statute the parties to the suit are permitted to testify in their own behalf. While it is not your business to question the policy of this law, it is not improper in weighing their testimony to consider their interest in the matter about which they testify.

Where there is clearly a conflict in the testimony of witnesses you will, in your efforts to arrive at the truth, sift such testimony and determine what and how much of it appears reasonable and probable in view of the circumstances. You are to apply the same tests in the jury room in determining the truth, that you would in your every day intercourse with men. There is no arbitrary rule of evidence which compels a jury to acquiesce in and accept as truth that which appears immaterial, improbable, and from its nature impossible. To illustrate, A swears he saw B strike C with a walking stick with intent to break C's arm. Now there is nothing unreasonable in A's testimony that he saw B strike C, but when he speaks of B's intent he assumes to substitute his own inference for knowledge, and the jury would not be bound to accept such inference as establishing the fact. So, if a witness testifies that two and two make five—that the sun (so to speak) rises in the west instead of in the east—that on a very dark night, without any light, it is as easy to recognize and identify a person across the street as at noon-day; or if a witness testify that the chairs upon which you sit are made of iron; that you have but one arm each—this and like testimony which contradicts the evidence of your own senses you would be bound to reject.

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There are two ways of impeaching the credit of witnesses: By showing that the reputation of the witness for truth is bad in the community in which he lives, or by showing that the witness has made statements out of Court or at some other time, under oath or otherwise, contrary to what he states on the stand. The object of all impeaching testimony is to show that the witness who is sought to be impeached is unworthy of belief.

It was formerly held to be the law that if it was evident that a witness testifies falsely in one material particular, the jury are to disregard the testimony altogether, only so far as it is corroborated by others. The inclination of the Courts however, latterly, is to hold that the whole question as to the credit of the witness should go to the jury, assuming that their knowledge of human character is a safer guide than any arbitrary rule of law upon that point. Jurors sometimes fall into an error in supposing that they are to determine a case by applying a mathematical rule to testimony. The language of Chief Justice Pennington upon this point is so pertinent, that I quote from that learned jurist the following:

"The circumstances of the case, the probable or improbable nature of the facts detailed, the character of the witness, the manner of his giving testimony, must all be taken into consideration, and ought, after being duly weighed, to carry conviction to the mind of the jury before they give it an effect by their verdict. It is common for jurymen to say, in excuse for giving a wrong verdict, that they believed it was wrong, but how could they do otherwise. The facts were sworn to, it was the fault of the witness, not theirs. This practice of jurors' loading on the witness their own sins, and making him a scape goat for the whole is grossly improper. It is true that jurors cannot, nor ought they to substitute in the place of proof their own fancies, conjectures or prepossessions, much less to suffer their passions, inclinations or biases to come in aid of proof, but are to govern themselves by the testimony given in the cause. But should a witness relate a fact, which, from its improbable nature, or from the badness of the character of the witness, taken together with other circumstances in the cause, on due consideration, does not carry a belief of the fact home to the minds of the jury, but on the other hand, they believe that what the witness has related is false; in that case what he has said is no evidence to them, and they are not bound

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to give any weight to it; but on the contrary, if they act upon it, or rather make up their verdict on it, such conduct is a departure from their duty, and little short of a violation of their oaths."

Take the case, Gentlemen, and apply to it the rules of law as announced by the Court, and under the solemnity of your oaths render such a verdict as the testimony and law dictates.

Your verdict will be in one of the following forms:

The jury find that the instrument propounded is the last will and testament of Thomas Patterson, deceased, or,

The jury find that the instrument propounded is *not* the last will and testament of Thomas Patterson, deceased.

Verdict against sustaining the will.

THE PEOPLE, *ex rel.*, WM. H. GREEN *vs.* THE HIGHWAY COMMISSIONERS OF THE TOWNSHIP OF COLDWATER.

1. Costs on the decision of an application for a mandamus after an order to show cause has been issued, and a showing made in answer thereto by affidavits, are taxed as on a motion and not as in ordinary suits at law in favor of the prevailing parties.
2. The order to show cause is answered by affidavits, and when heard on such answer the proceedings are treated and considered prior to the issuing of the writ of mandamus as a motion or an application for the issuing of the writ, and under Act No. 28, Laws of 1869, page 33, costs in such proceedings are to be awarded as in cases of special motion.

Branch Circuit, February, 1871,

Motion for re-taxation of costs.

Upon the application of the relator in this case an order to show cause had been issued to the Commissioners of Highways, who had answered the same by affidavits, and on the hearing, a motion for a mandamus had been denied. The Commissioners, however, claimed that as in the order denying the motion, time had first been given to the relator to traverse the facts set up in the answer or affidavits, if he saw fit, so as to tender an issue of fact for trial, and that as the relator had elected not to do so, the attorney for the Commissioners had formally entered his default on the expiration of the time, making the order denying the motion absolute, with costs, and

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therefore they were entitled to tax under Act No 28, Laws of 1869, page 32, costs as in a judgment taken by default and paid accordingly, included \$15 in their bill of costs under that head. The relator objected to the taxation of this item, and appealing therefrom moves for a retaxation.

Shipman & Loveridge and C. B. Pratt, Attorneys for Relator.

L. T. N. Wilson, Attorney for Commissioners.

By the Court, UPSON, J.—Applications for a mandamus in which a rule or order to show cause has been granted and a hearing had on answer made to such order by affidavits, have usually been considered and treated as motions. 1 *Doug. Mich. R.*, 302, 319, 417, 434; 2 *Id.*, 121; 1 *Mich.*, 134, 359; 2 *Id.*, 188, 192; 3 *Id.*, 427; 4 *Id.*, 187; 9 *Id.*, 134, 141, 327, 328; 11 *Id.*, 111, 222; 12 *Id.*, 171, 191; 16 *Id.*, 204; 17 *Id.*, 67, 159, 338, 341; 18 *Id.*, 247, 254, 338; 19 *Id.*, 203, 351.

And costs on such hearings in the Supreme Court are somewhat discretionary, and are given or denied as on motions. In the following cases costs were denied, viz: 2 *Mich.*, 188; 5 *Id.*, 223; 17 *Id.*, 338; 19 *Id.*, 470. In the following cases costs were allowed, viz: 11 *Mich.*, 69, 222; 15 *Id.*, 156; 17 *Id.*, 260; 18 *Id.*, 247; 19 *Id.*, 203, 296.

The order in granting costs also usually specifies or fixes the amount, notwithstanding Rule 48 of the Supreme Court, in regard to the amount of costs to be allowed to the "prevailing party." 15 *Mich.*, 155; 18 *Id.*, 247.

In each of the cases last cited the Court allowed but \$10 costs, although Rule 48 of said Court allows "in cases disposed of upon argument a counsel fee of \$30." Such applications for a mandamus were evidently not considered as included in that rule, although in 11 *Mich.*, 197, and 19 *Id.*, 11, they are considered calendar cases.

In the case in 15 *Mich.*, 156, a like opportunity was also given to the respondents to have an issue of fact made up for trial by jury, which they had declined to accept. See an instance where such an issue of fact was ordered to be sent down to the Circuit for trial, in 17 *Mich.*, 159.

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Where such a trial is had, doubtless a different rule as to costs would obtain in the case. Under the circumstances of this case it must be considered a special motion, and the costs awarded on it as in cases of motion. The Act, No. 28, of 1869, page 32, provides that "in all cases of special motion, such sum shall be awarded to either party as the Court in view of the circumstances shall deem just," which provision in its terms seems applicable here, if that act is to regulate and govern in these cases. Let the order denying the application for mandamus with costs, be so amended as to fix the costs awarded at \$10, and the bill of costs be taxed in conformity to such order.

WILLIAM C. BURNS vs. GEORGE P. KINNE.

1. An affidavit for an attachment under § 4743, *Comp. Laws*, stated in positive language the amount of the indebtedness of the defendant to the plaintiff at a certain sum, without using the qualifying words of the statute, "as near as may be," *Held*, sufficient.
2. The affidavit also stated in positive terms the non-residence of the defendant, without using the prefatory statement "that the deponent knows," or "that the deponent has good reason to believe," specified in the statute. *Held*, sufficient, and that in each particular there was a substantial compliance with the statute.

Branch Circuit, February, 1871.

Motion to quash writ of attachment and set aside the proceedings thereunder, on the grounds:

1. That in the affidavit for the attachment the deponent in stating the amount of the indebtedness of the defendant did not in substance or in fact use the qualifying words, "as near as may be," as prescribed by the statute, § 4743, *Comp. Laws*.
2. That the deponent in swearing to the non-residence of the defendant did not in substance or in fact use the qualifying words, "that the deponent knows, or has good reason to believe," &c., as prescribed by the statute.

The affidavit on which the attachment issued is in the words and figures following, viz:

"STATE OF MICHIGAN, }
COUNTY OF BRANCH. } ss.

William C. Burns, being duly sworn, says that he resides at the

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city of Coldwater, in said county, that George P. Kinne is indebted to him, the said William C. Burns, in the sum of four thousand dollars and interest thereon, from the 21st day of November, A. D. 1870, over and above all legal set-offs, and that such indebtedness is due and owing upon express contract, and the whole amount thereof is now due. Deponent further says that the said George P. Kinne is not a resident of this State of Michigan, and does not and has not resided therein for three months immediately preceding the time of making this affidavit, but that said George P. Kinne has for a long time and still does reside in the county of Steuben, in the State of New York.

W. C. BURNS.

Subscribed and sworn to before me, this 30th day of December, 1870.

FRANCIS M. BISSELL,
Clerk."

Levi Sprague, Defendant's Attorney for the motion.

Shipman & Loveridge, Plaintiff's Attorneys.

By the Court, UPSON, J.—In the affidavit for the writ of attachment in this case, the deponent has sworn directly and positively to the fact and the amount of indebtedness to him, without using the words, "as near as may be," which are given in the statute in this connection, § 4743, *C. L.* He also swears directly and positively to the fact of the non-residence of the defendant, without prefacing his statement with the words, "that the deponent knows," or that the deponent has good reason to believe," as prescribed by the same statute in that connection. It seems to me that the legal effect of the affidavit is the same as, or if possible stronger in its positiveness of statement in each particular, than if the qualifying words insisted upon in the statute had been used.

In each of these particulars, on an indictment for perjury against the deponent, if it were made to appear that he knew nothing of the matter he so positively swears to, he would be found guilty of perjury even though what he swore to may happen to be true. 2 *Russ. on Crimes*, 597.

He is allowed by the statute to use the qualifying or modifying

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words where his own knowledge may be so defective or limited as to require such use. If he swears to the necessary fact or facts unqualifiedly and positively, I see no impropriety or injustice in holding him to swear to it in his affidavit, on his own knowledge and as correct, he having had the opportunity to qualify it under the statute if not within his knowledge, or if not exactly correct in amount. In the matter of non-residence also, he gives in the affidavit the further fact in support of the allegation, that the defendant is a resident of the State of New York. On this point the language of the affidavit is almost literally like the one in *Dorr vs. Clark*, as given in the opinion of the Court, 7 Mich. R., 312; which affidavit was held sufficient, although the point there raised is not precisely like the one made here.

In *Wilson vs. Arnold*, 5 Mich., 104, the Court say, in speaking of the statement in the affidavit of the indebtedness, the amount and that it was on contract: "All these facts must be sworn to positively; not necessarily in the words of the statute, but in language equivalent to that of the statute. The other facts to be stated in the affidavit need not be stated positively, for the Statute itself discriminates between the facts to be sworn to positively, and those that need not be so sworn to." See also the case of *Barker vs. Thorn*, decided by the Supreme Court, April, 1870.

The affidavit in this case must be considered a substantial compliance with the statute, and therefore sufficient. Motion denied, with \$5 costs.

CALISTA O. VAN SLICK vs. JEROME S. WOLCOTT, LEVI SPRAGUE
HENRY CLARK AND W. J. BOWEN.

1. Under § 4113, of *Comp. Laws*, a motion to require the plaintiff to file security for costs, made at the third term after issue joined in the cause, without showing any reason for the delay, comes too late, and will be refused.
2. Under the statute, the motion is addressed to the sound discretion of the Court, and when made at such a late day, without giving any special reason therefor, it can hardly be said to "appear reasonable and proper" to grant it.
3. Even under § 4113 requiring non-resident plaintiffs to have all writs and declarations endorsed before service thereof, by some sufficient person as security for costs, who is an inhabitant of the State, if the plaintiff neglect so to do and the defendant do not apply promptly for the security, he will be deemed to have waived it.

Branch Circuit, February, 1871.

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Motion by defendants to require the plaintiff to give security for costs, under § 4115, *Comp. Laws*. The only ground urged in the affidavit on which the motion was founded was that the plaintiff had not property liable to execution, sufficient to satisfy any execution for costs that might be recovered against her in the action. The action was in trover, the parties were all residents of the city of Coldwater, the issue had been joined in the cause on the 23d of May, 1870, and this was the third term subsequent to the joining of the issue. No reason or explanation was given for not having made the application at an earlier day.

C. B. Pratt, Plaintiff's Attorney.

L. Sprague, Shipman & Lowridge, Defendants' Attorneys

By the Court, UPSON, J.—The provision in the statute, § 4115, *Comp. Laws*, authorizing the Court to require a plaintiff to give security for costs in civil actions pending therein, "when it shall appear reasonable and proper" so to do, was manifestly made for the benefit of defendants, and therefore may be waived by them if they see fit not to call seasonably for its exercise. When the application is made promptly the motion is still addressed to the sound discretion of the Court, and it must be made to appear "reasonable and proper" to grant it before the parties applying can appropriately call upon the Court to exercise this power under the statute. In this case the parties all reside in this city, are personally known to each other, and are presumed to have had reasonable knowledge of each other's pecuniary circumstances, at least prior to or at the time of joining issue herein, yet they have seen fit to wait until the third term subsequent to the joining of issue before making this application, and in their affidavit make no explanation of, and give no reason for the delay. Reasonable diligence in making the application should be required, and that seems not to have been exercised in this case.

Even under § 4113, requiring all original writs and declarations for the commencement of suits, where the plaintiffs are not inhabitants of the State, to be, before the service thereof, indorsed by some sufficient person who is an inhabitant of this State, a party is required in case of its omission by a plaintiff to take advantage of it in season, and if he does not he has been adjudged

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to waive it. *Carpenter vs. Aldrich*, 3 Met., 58. See also as to the rule in such cases requiring the motion to be made promptly, and in the first instance, or it is waived, *Adams vs. Miller*, 12 Ill. 27; and 14 Ill., 71; *Edwards vs. Helm*, 4 Scam., 143; *Robertson vs. The Co. Com'rs*, 5 Gilm., 559; *Randolph vs. Emerick*, 13 Ill., 344; *Frasue vs. Zimmerly*, 25 Ill., 202; 2 Ark., 109; 2 Rich., (S. C.), 10.

The English practice also requires the defendant to make his application promptly after he knows of the plaintiff's being abroad, and before he takes any subsequent step in the cause.—*Grah. Pr.*, 507; 2 Chit. Archb., 864; 5 B & Ald., 702; 1 D. & R., 348; 1 Moore & Payne, 30. See also cases cited in margin of *Comp. Laws*, § 4113, by compiler.

The motion in this cause comes too late, and under all the circumstances it does not "appear reasonable and proper" to grant it, and it must be denied.

EDSON TERRILL vs. CASSIUS G. GROVE.

Where an attachment writ had been quashed on motion of defendant for defective affidavit, before any declaration had been filed therein, and before any appearance of the defendant had been entered therein, save for the purpose of the motion, *Held*, that under Act 28, Laws of 1869, the costs therein provided to be taxed in favor of the prevailing party, under the head of "for proceedings before notice of trial," were not allowable or taxable in such a case.

Branch Circuit, February, 1871.

Motion for re-taxation of costs.

The suit was originally commenced by attachment, and at a previous term of the Court the writ, on motion of the defendant had been quashed and the proceedings thereunder set aside with \$5 costs, on the ground of the insufficiency of the affidavit.

No declaration had been filed in the case, and no appearance entered on the part of the defendant at the time of the order quashing the writ, save for the purpose of making the motion. (A report of the case will be found in 2 *Nisi Prius*, 3)

The defendant in taxing the costs, claimed and had entered in the taxed bill the sum of \$10, "for proceedings before no-

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tice of trial," under Act No. 28, of 1869. The defendant objected to this item and now moves for a re-taxation.

C. B. Pratt, Plaintiff's Attorney.

Shipman & Loveridge, Defendant's Attorneys.

By the Court, Urson, J.—The Act No. 28, of 1869, page 32, in regard to costs, contains among other things this provision, viz: "In all cases of special motion such sum shall be awarded to either party as the Court in view of the circumstances shall deem just."

Under this clause the sum of \$5 costs was awarded to the defendant at the time the motion to quash was granted.

That motion includes everything that has been done in the case on the part of the defendant. There are no other proceedings in the case for which defendant can claim costs, and there is good ground for insisting that where a defendant has not appeared generally in a cause and no issue has been joined or declaration filed therein, as in this case, the clause in the statute providing for taxing a certain amount of costs to the prevailing party, "for proceedings before notice of trial," does not apply in favor of such defendant, where on his motion the writ has been quashed. The motion must be granted and the item of \$10 objected to must be rejected in the taxation of costs.

ANN HUTTON, Appellee, vs. AMAZIAH R. BALCH, Appellant.

Allegan Circuit, March, 1871.

Motion to place the cause on the trial calendar.

By the Court, BROWN, J.—This case comes into this Court on appeal from Justice's Court.

The notice of trial was served upon the attorney of the appellee, whose appearance has been duly entered in this Court and was signed, "Balch, Smiley & Balch, attorneys for appellant."

It is admitted that the appearance of appellant's attorneys has not been entered in the common rule book.

J. V. Rogers, for Appellee, insists that the motion should be denied, and cites Rule 100, of this Court, as follows:

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"No attorney shall be deemed to have appeared in any civil cause appealed to this Court from judgments rendered by Justices of the Peace, until such attorney shall have entered his appearance by rule in the common rule book."

No note of issue has been served on the Clerk as required by § 4348, C. L., and no cause is shown for the neglect.

The non-compliance with the rule and the statute referred to, or either of them, is deemed sufficient reason for denying the motion.

MILO D. MATTISON vs. CHAUNCEY W. BUTTERFIELD AND HENRY MANEE.

Plaintiff brought assumpsit on promissory note for \$114, and recovered that sum. *Held*, that the defendant was entitled to costs.

Van Buren Circuit, 1871.

The plaintiff brought suit on a promissory note. Judgment was rendered for \$114, being full amount of the note and interest, and the full amount established at the trial.

The defendant moves for judgment for costs.

S. H. Blackman, for the motion.

N. Foster, Contra.

By the Court, BROWN, J.—The case of *Baldy vs. Smith*, 1 *Mich. Nisi Prius*, 156, has been referred to, at the argument, as authority for the defendant. The plaintiff's counsel insists that that case does not warrant the construction claimed. In that case the amount of the plaintiff's claim, as established at the trial, was \$92 94, or an amount under \$100.

The question under consideration was discussed in *Strong vs. Daniels*, 3 *Mich.*, 474. In the report of that case the learned Judge is made to say, "The recovery of costs is a matter regulated by statute. Sub. 4, of sec. 3, chap. 149, of the *R. S.*, provides "that in all actions for the recovery of any debt or damages, or for

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the recovery of any penalty or forfeitures, where such actions are cognizable by a Justice of the Peace, the plaintiff shall have costs." From this provision (as quoted) the Supreme Court was led to conclude that, independent of any other provision, the plaintiff would be entitled to costs in all cases if he prevails, whatever amount of debt he might recover. By an examination of the statute referred to, it will be seen that the provision relates to "such actions as are not cognizable by a Justice of the Peace."

With a quotation of the statute, as appears in the published laws, I think the conclusion of the Supreme Court must have been that "this provision, standing alone, and unconnected with, and independent of any other provision, would give the plaintiff cost in all cases" *not cognizable by a Justice of the Peace*, "if he prevails, whatever amount of debt he might recover." The statute just referred to, is Sub. 4, of § 5597, *C. L.*

The fifth subdivision of the same paragraph provides that "in all actions where the plaintiff shall recover any sum, if it appear that his claim, as established at the trial exceeded two hundred dollars, and the same was reduced by set-off," he shall be entitled to costs. And where a question arises, where the defendant has set-offs and plaintiff recovers less than \$200, as to whether the plaintiff has established a claim exceeding \$200, the Judge and not the jury is to determine that fact. *Davis vs. Freeman*, 10 *Mich.*, 192.

It was held in the case of *Inkster vs. Carver et. al.*, 16 *Mich.*, 488, that the law of 1867 is not to be understood as changing the pre-existing law in regard to the party entitled to recover costs in suits commenced in the Circuit Court. The "pre-existing law" referred to, is to be found in subdivisions 4 and 5, of § 5597, of the *C. L.*, already referred to.

Is this action one cognizable before a Justice of the Peace—within the jurisdiction of a Justice of the Peace?

A Justice of the Peace has original jurisdiction of all civil actions wherein the debt or damages do not exceed one hundred dollars; and concurrent jurisdiction wherein the debt or damages do not exceed three hundred dollars, except in certain specified cases, as libel, slander, &c. *C. L.*, §§ 3653, 3654. See also § 3418, *C. L.*; Sec. 18, Art. 6, *Const.*

This action was brought to recover upon a promissory note, upon

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which the plaintiff claimed and recovered judgment in the sum of \$114. This was within the jurisdiction of the Circuit Court. It was also cognizable before a Justice of the Peace. To say that it was not within the *exclusive* jurisdiction of a Justice of the Peace would be true, but it would not be true to say that it was "not cognizable before a Justice of the Peace." This being the case, it follows that there is nothing in the fourth subdivision of § 5597 authorizing the plaintiff to recover costs.

The plaintiff's claim as established at the trial did not exceed two hundred dollars. It follows that he is not entitled to recover costs under the fifth subdivision.

The attention of the Court has not been challenged to any other provision of law by which the plaintiff would be entitled to recover costs, and I have been unable to find any such provision.

It is true that at the time of the passage of the law governing costs, Justices of the Peace did not have concurrent jurisdiction with the Circuit Courts. But as to the propriety in retaining the old law, notwithstanding the provision in our new constitution and the legislation had in pursuance thereof, the Court has nothing to do. The Supreme Court has, in several decisions since the adoption of the new constitution recognized the prior statutes as to the party entitled to costs, as still in force.

From the foregoing considerations I am forced to the conclusion that the plaintiff is not entitled to costs, and by reference to § 5600, *C. L.*, it will be observed that "in case a plaintiff recover judgment, but not enough to entitle him to costs" the defendant is entitled to judgment for his full costs.

Let the defendant's costs be taxed and judgment be rendered in his favor therefor.

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Mala Fides.—Where a person purchasing within a few days after its execution, from the payee, a note payable to bearer, and knows the maker to be a responsible farmer of foreign birth and limited knowledge of English—the character of the payee's business, that he is a transient, unknown and irresponsible vender of patents, and buys such note without asking any questions, and at a large discount, he is not a *bona fide* purchaser.

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A purchaser who is told the maker claims his note was given without consideration and will not pay it, is not a *bona fide* purchaser.

Berrien Circuit, 1871.

By the Court, BLACKMAN, J.—Boyce bought of Fulton, who bought of Lyon, one of the payees, the note of the defendant, of which this is a copy :

"\$400 00.

Niles, March 9th, 1869.

One year after date, the subscriber, of *Niles Township*, the county of *Barion* and State of *Michigan*, promises to pay Lyon & Burleigh or bearer, *four hundred dollars*, value received, with ten per cent interest.

JOHN M. GEYER."

When Boyce purchased the note he was told that Geyer was an honest, responsible, thick-headed Dutch farmer, who claimed he had no consideration for the note, and would have to be sued before he would pay it.

Boyce purchased before maturity, and paid full value.

Fulton bought of Lyon, besides Geyer's note, the notes of three other responsible farmers, amounting in all to \$1,200 00, for which he paid \$1,000 00, as follows : \$150 00 in cash, and a stallion, said to be worth by a disinterested witness, between \$400 00 and \$500 00. He made the purchase in a very few days after the date of the note. He had purchased some notes of Lyon the year before. At this first purchase he asked of Lyon his business, residence, and the consideration, and then before paying for them saw the makers. On the rights these makers then bought, Fulton knew nothing was ever obtained. From the information then received from Lyon, Fulton knew him to be one of those transient, traveling and unknown patent right dealers, who infest the State. Fulton knew Lyon was anxious to sell for what he could get. Geyer was resident but some 3 miles from his office. He knew Geyer was as responsible as the best men in the country, that he was a farmer, of foreign birth, and little acquainted with English writing. The makers of the other notes were equally good. Fulton traded for the notes, asking no questions for conscience' sake.

After his purchase he had two conversations with Geyer, in which Geyer stated his case.

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At the sale to plaintiff he told him the note was one of the best he had, was worth its face, that the maker was a thick-headed Dutch man, who would have to be sued, but that the plaintiff would have no difficulty in collecting it, though knowing it was obtained by fraud.

The note was obtained from Geyer by these practices :

Lyon, in company with a lad who signs his name Billy Burleigh, called on defendant in his field, and proposed to make him an agent to sell Fisk's Fanning Mill. Defendant objected, but after listening to some honied words from Lyon the parties went to defendant's house. Then defendant agreed to take the agency. A contract made out in blank and *inter partes* was read to Geyer, and executed in duplicate.

No consideration for the agency was asked, and no money to be paid for it talked of, yet in a part of the contract, not read to Geyer, was a statement that he had paid \$400 00 in note for it (the appointment.) By this contract Geyer was only to pay \$15 00 apiece for the mills, sell them for \$50 00, and pay over 25 per cent. of the profits to Lyon & Burleigh.

Then Lyon questioned him as to his property, and minuted his replies on the back of a slip of paper, and then asked Geyer to sign it, which he did. Lyon then told him he did not want him to sign there, but on the other side. On turning it over Geyer saw a printed blank not filled out. This blank is the note in question, without the letters in *italics*, or the figures. Geyer asked why he should sign that, and was told by Lyon that at the end of the year he should go to the maker's shop in South Bend, find how many mills he, Geyer, had bought, and then he would fill up the blank with their share of the profits, so that in case of Geyer's death he should have some evidence of his liability. On this representation Geyer signed the blanks. The note was afterwards filled out and stamped.

Upon these facts it is clear that this note was without consideration, was obtained by fraud, and fraudulently put in circulation, and therefore void in the hands of the payees and every *mala fides* holder.

Were Fulton and Boyce, or either of them, purchasers in good faith?

In answering this question, I shall assume the law to be cor

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rectly stated in *Goodman vs. Simonds*, 20 How. U. S. R., 366; and require proof to defeat the holder's right, that he had knowledge of the facts and circumstances, or that the transaction is attended by bad faith.

But knowledge of the facts in detail is not necessary. General notice that there is some fraud, though he may not know the precise nature, is as sufficient as if he were told there was something wrong about it. *Byles*, 119; 2 *Par. on Bills*, 279.

Applying this rule to Boyce, we see that he had notice the note would be contested for want of consideration, and took it on the strong recommendation that it could be collected by law.

For five years or more, the southern part of this State has been swindled of large sums by unknown dealers in patent or patented articles. This fact is quite notorious. The schemes have been successful through the aid of note dealers, and those men have relied on the Courts adhering to the law merchant, as understood by them. They should understand the law adapts itself to whatsoever men do as they do it—that wilful abstinence from inquiry where the circumstances of the particular transaction are such as show that the purchaser abstains from the inquiry lest it should disclose a vice in the bill, is evidence of bad faith—that buying a perfectly good note at half price is evidence of bad faith—that shaving with these traveling and transient venders of patent articles in the plunder of one's neighbors, can no more be honestly done through silence than buying at half price articles from a thief you know could not have come honestly by them.

The vender and the buyer both know that the note must be transferrable by delivery and must be held by a *bona fide* holder for value. The vender sees to it that he gets such a note, and the buyer sees to it that he is innocently ignorant of every fact which will weaken his title. There is simply a strife to see which shall get the greatest share of the plunder. Then the vender disappears never more to be seen or heard of.

Fulton says he knew Lyon was a travelling dealer in patents, but did not inquire how he came by the note because he thought it was given for a patent pump.

He had a general knowledge of the swindling going on in

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patent rights. It seems to me he intentionally and for a purpose abstained from inquiring, because inquiry would have deprived him of \$200 00 on this note. See on this point, *Chitty on Bills*, 11 *Ed.*, p. 258; *Byles on Bills*, side-page, 119.

That he was not bound to inquire where there were no reasons for it, I admit, but in this case he knew too much to be silent and blind together.

I must hold therefore that in purchasing the note he was knowingly participating with Lyon in the profits of the fraud and that he is not a *bona fide* holder.

JAMES LITTELL vs. ALFRED B. HINMAN *et al.*

An order entered after verdict and before judgment, extending time for settling bill of exceptions is as valid and binding as if made after judgment.

Wayne Circuit, March, 1871.

Dickerson & Dickerson, for Plaintiff.

C. A. Kent, for Defendants.

By the Court, PATCHIN, J.—This case was tried in the November term, 1870, and a verdict rendered against defendants on the 15th day of December, 1870. On the 13th of January, 1871, an order was entered extending the time in which to settle a bill of exceptions until the further order of the Court.—January 19, 1871, a motion for a new trial was argued and submitted. January 23, 1871, the motion for a new trial was denied and judgment was at the same time entered on the verdict, the 24th day of January, 1871, being the first day of the next succeeding term. No further order extending the time has been made since, and now, (March 20, 1871, being the next term after the cause was tried) the defendant presents a bill of exceptions for settlement.

The plaintiff objects, on the ground that the term at which the cause was tried having passed, the Court cannot now extend

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the time so as to settle a bill of exceptions. The statute provides that a bill of exceptions shall be settled as provided by the rules of Court. (*C. L.*, § 3439.) Rule 85 provides that a bill of exceptions shall be settled during the term at which the trial was had, unless the Court or Circuit Judge shall otherwise order.

The Supreme Court, in construing this rule, say that a bill of exceptions must be settled at the term in which judgment was entered, or an order entered at that term, extending the time. 14 *Mich.*, 334.

It is conceded in this case that the order extending the time was entered at the same term of the judgment. But it is claimed that, being entered before the judgment, it was not binding, and therefore cannot be now considered.

If the order was premature and the bill of exceptions could not be settled until after judgment, there would be some force to the objection. But if, on the other hand, a bill could be settled at the time the order was taken, it was already within the power of the Court to extend the time for that purpose. A bill of exceptions has been defined to be the statement in writing of the objections made by a party in a cause to the decision of the Court on a point of law. The object of the bill of exceptions is to put the question of law on record for the information of the Court of error having jurisdiction of the cause.

The theory of the law is that the bill of exceptions must be tendered at the time the decision complained of is made; or if the exception be to the charge of the Court, it must be made before the jury have given their verdict.

In practice, however, the point is merely noted at the time and the bill settled afterward, being, however, nothing more than a mere amplification of the notes already taken, and containing only those points to which exceptions have been made.

The statute only limits the time for completing the bill, leaving the exceptions to be made as above indicated. It will be seen then, that the bill of exceptions in a cause is really made (although not put in form), even before the verdict; and inasmuch as it is only intended to contain such matters as do not appear upon the record proper, and only such as are completed be-

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fore the judgment, it follows, in the absence of any statute prohibiting it, that a bill of exceptions may be settled before judgment.

In the case at bar, then, a bill of exceptions could have been settled at the time the order extending the time was entered.

It follows, therefore, that the order was valid and the time properly extended. The objection to settling a bill of exceptions must therefore be overruled.

ROBERT HOSIE vs. E. HARRINGTON *et. al.*

§ L. 1869, 101, provide that when suit is commenced against two or more *joint* defendants, one or more of whom shall reside or be found in the county where the suit shall be brought, and one or more of the defendants shall be served with process or declaration in the county where suit is commenced, the plaintiff in such action may sue out one or more writs of summons, or other writ whereby such suit was commenced, directed to the county where such defendant not so served may be found. *Held*, that the statute applies only to defendants *jointly* liable.

Wayne Circuit 1871.

D. Dickinson, for Plaintiff.

D. C. Holbrook, for Defendant.

By the Court, PATCHIN, J.—This case was commenced by declaration, and one of the defendants, who resided in this county, was served, and another defendant, who is not jointly liable, and who lives out of the county, was also served with declaration.

The law of 1869, page 101, provides that when suit is commenced against two or more *joint* defendants, one or more of whom shall not reside or be found in the county where the suit shall be brought, and one or more of the defendants shall be served with process or declaration in the county where suit is commenced, the plaintiff in such actions may sue out one or more writs of summons, or other writ whereby such suit was commenced, directed to the county where such defendant not so served may be found.

The only question for consideration is, whether the law above

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referred to applies to all cases of defendants, whether jointly liable or not, or whether by joint defendants is meant only those jointly liable.

I have been unable to find any cases in the books on this subject to aid in giving a construction to the law. In cases where the defendants are jointly liable, the appearance and defense of the resident defendant would in some degree at least protect the interests of the non-resident defendants; but in cases where there is no joint liability, the resident defendant might be quite as much interested as the plaintiff to establish the liability of the non-resident defendant.

It is easy to believe that the law was not intended to apply to defendants generally, and hence the use of the qualifying term making it applicable only to *joint* defendants, or defendants jointly liable. I am of opinion, therefore, the service on the non-resident in this case was not warranted and must be set aside.

ELISHA CLARK vs. HARRY SPENCER.

Suit commenced in Wayne Circuit by declaration in assumpsit. Neither party resided in Wayne County. Defendant plead in abatement the want of jurisdiction in the Court the statute providing that actions of this kind shall be *tried* in the county where one of the parties shall reside at the time of commencement of suit. *Held*, on demurrer to plea in abatement that the law referred to does not prevent the commencement of the suit in a county where neither party resides, but only the *trial* of the cause, and that the only effect of the law in such case is to remove the cause for *trial* into a county in which one of the parties resided at the time of the commencement of the suit.

Wayne Circuit, March, 1871.

J. W. A. S. Cullen, for Plaintiff.

L. T. Griffin, for Defendant.

Demurrer to plea in abatement.

By the Court, PATCHIN, J.—The plaintiff in this case resides in Windsor, Canada, and the defendant in Oakland County, in this State.

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The suit was commenced by declaration in assumpsit, which was served upon the defendant in this county. The defendant put in a plea of abatement, to which the plaintiff demurred.—The only question raised by the demurrer is, whether both parties being non-resident, this Court has jurisdiction of the cause. It is conceded that, so far as the pleadings show, before the plea in abatement, jurisdiction was complete, but it is claimed that as soon as it appears that both parties are non-residents that jurisdiction ceases.

The statute provides that actions of this kind shall be *tried* in the county where one of the parties shall reside at the time of commencing such action, unless the Court shall deem it necessary for the convenience of parties and their witnesses, or the purposes of a fair and impartial trial, to order any such issue to be tried in some other county, in which case the same shall be tried in the county so designated. *Laws of 1869*, page 9. My attention has not been called to any other statute affecting the case in any particular. It will be noticed that the place of trial is only mentioned here, and not the commencement of suit. It is quite clear that the effect of the law would be to remove the cause for *trial* in the county where one of the parties resided at the commencement of the suit, unless otherwise ordered by the Court for some of the reasons mentioned in the law, for if the cause is *tried* in such county the law is fully complied with.

It cannot be claimed that the cause must be tried in the county where it is commenced, for the reason that there is no such provision in the law, it only providing that regardless of the commencement, the cause must be *tried* in a certain locality. The case at bar undoubtedly, unless coming within the exceptions, cannot be tried in this county.

The demurrer, therefore, must be sustained.

HARTNESS v. THE GREAT WESTERN RAILWAY COMPANY OF CANADA.

JAMES HARTNESS vs. THE GREAT WESTERN RAILWAY COMPANY OF CANADA.

Plaintiff shipped certain goods by G. W. Railway from Detroit to New York City, the price for the whole service being agreed upon by plaintiff and company, and at the same time, plaintiff signed an agreement with the company that the latter would not be liable for loss of market or other claims, arising from delay or detention, on the journey, under any circumstances. The goods were detained at Suspension Bridge, the N. Y. Central Company refusing to receive them; whereupon suit was brought by plaintiff to recover damages.

Held, That the responsibility of the common carrier to convey the property, as agreed, to its destination, having undertaken to do so, and fixed the price for the service, may be waived by the consignor, and the common liability may be waived by a clear and distinct agreement. And when a person making a contract actually signs a paper referring in plain terms to a condition on the back of the paper itself, and a like one is at the same time delivered to him, the law presumes that he understands and assents to each and every condition contained therein.

This is an action against the railway company for damages occasioned by the delay of freight in transit from Detroit to New York.

The case was tried by a jury, and a special verdict rendered.

The special verdict sets forth that in December, 1864, and January 1865, the plaintiff delivered to the defendants at Detroit, certain goods to be sent over their road to New York City; that the charge agreed upon was seventy-five cents per hundred for the entire distance; that at each shipment of goods the defendants gave to plaintiff a receipt or shipping note containing the following: "Received from James Hartness, the undermentioned property, to be sent by the Great Western Railway Company, subject to their tariff, and under the conditions stated on the other side," and signed by the agent of the company. At the same time the plaintiff executed and delivered to the defendants a paper or order, signed by him, containing the following: "The Great Western Railway Company will please receive the undermentioned property directed to Colgate & Co., New York, to be sent subject to their tariff, and under the conditions stated on the other side." The conditions above referred to were not as a matter of fact actually read by the plaintiff. It appears further that the delay was occasioned by the refusal of the New York Central Railroad Company to receive the goods at Sus-

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pension Bridge, after they had passed over the defendant's road, and forward them to their destination, the defendants having no business relations with said road.

It is conceded that, if the conditions on the back of the papers above referred to are binding, then the defendants are not liable in this action for the delay at Suspension Bridge, one of the conditions being that they will not under any circumstance be liable for loss of market or other claims arising from delay or detention of any train, whether in starting or at any of the stations or in the course of the journey.

D. C. Holbrook, Attorney for Plaintiff.

T. Romeyn, Attorney for Defendants.

By the Court, PATCHIN, J.—The relation of common carriers to the public is one of the most important as well as interesting subjects with which the judiciary have to do.

The question is very fully discussed by the Supreme Court of this State in 16 *Mich.*, 79. The question there discussed, whether the nature of the business done, or the person doing it, gives character to warehousing, does not, however, arise in this case.

Common carriers, when they become such, assume certain relations to the public that they cannot dispense with except by the consent of the parties interested; and, indeed, by the laws of 1867, page 165, only when consent is given in a certain manner.

In the case above referred to, 16 *Mich.*, 111, it is said that "subject to reasonable regulations, every man has a right to insist that his property, if of such description as the carrier assumes to convey, shall be transported subject to the common liability."

Whether it is the policy of the law to protect a man against his own acts, by prohibiting his entering into a contract, although fully and fairly understood by him, not because he may thereby injure his fellow men, but only for the reason that in the opinion of the law maker it would not be for his interest to make such a contract, may well be questioned.

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It has generally been supposed that the great object of governments and law is to protect the citizens in such undertaking as to his own judgment may seem best, subject only to such restriction as will fully prevent his neighbor's interest from being in the least affected.

The presumption of law is, that every one understands its provisions, and ignorance in that regard cannot be pleaded in law. It would seem that a degree of intelligence that would enable a person to understand intricate questions of law would be quite sufficient to protect him against the evil consequences of his own contracts, especially when it is remembered that those who have to do with common carriers are in almost every instance men of large experience, who would hardly admit that they require the protection of the law against their own acts. How successful the law makers will be in this respect remains to be seen.

It is claimed, on the part of the plaintiffs, that in fixing the price to be paid for the entire distance, the defendant, thereby became responsible; but it can hardly be said that that responsibility cannot be waived by a clear and distinct agreement. I cannot avoid the conclusion that where (as in the case at bar) a person making a contract actually signs a paper referring in plain terms to a condition on the back of the paper itself, and another one containing the same conditions is delivered to him at the same time, and this continuing through several transactions with precisely the same papers in each, then the law presumes that he understands and assents to each and every condition contained therein.

It follows, therefore, that the contract made by the plaintiff is binding, and he cannot recover in this action for any damages sustained which were expressly waived by his contract. The judgment on the special verdict must be for the defendant.

THE MICHIGAN NISI PRIUS.

MAY, 1871.

JAMES CUMMIN vs. CHAUNCEY ABBOTT, HENRY WILCOX, HOMER C. WILCOX, ANDREW WILCOX AND MARCUS WILCOX.

In order to maintain a suit to quiet title, the complainant must establish a clear legal or equitable title in himself.

The grantor of complainant having made an assignment under the laws of Pennsylvania, for the benefit of creditors, and having subsequently assented to a conveyance from his grantor to defendant (the one to him being lost and not of record) had no title to convey to the complainant, and his assent to the conveyance to defendant must be taken as conveying title to defendant, where no record title from defendant's grantor intervened.

Shiawassee Circuit, May, 1870.

Bill to quiet title, submitted on pleadings and proofs.

By the Court, MITCHELL, J.—Bill filed March 5, 1869, setting forth that complainant is owner and in actual possession of N. pt. of N. E. frl. 4, Sec. 3, T. 6, N. R. 3 E.—worth \$1500—that title is derived from United States “by and through those under whom he claims,” and that his title is perfect at law and in equity (without any more fully setting it forth)—that no other person has any title or interest in the land, but that Chauncey Abbott claims to be the owner, and to have derived title from the United States—that Henry Wilcox claims to be owner under Abbott. Alleges as facts the contrary, and states Abbott’s deed was obtained by fraud and false pretences. That in 1840, Walker conveyed the land to Wm. N. Smith—Walker had title by patent from United States, and six years after date of patent conveyed to Smith. Smith sent deed by Abbott, his brother-in law, to record, and Abbott for fraudulent purposes did not have it recorded, and pretended it was lost; that Ab-

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bott applied to Walker and told him the deed was lost and that he was agent of Smith; that Smith was embarrassed, &c., and therefore wanted deed in his, Abbott's name. Walker disclaiming ownership, but believing statements, gave a quit claim deed to Abbott; that the deed to Smith was not lost, but suppressed or concealed, &c., for the purpose of injuring Smith, and to procure a deed to himself, (Abbott,) and deed to him was procured by gross fraud.

Henry Wilcox has no actual interest, and bought conditionally. Complainant's title is perfect, but Abbott's claim constitutes a cloud, &c.

The answer shows that defendant, Abbott, claims to be the owner by a patent from the United States to H. C. Walker, June 17th, 1836, and by quit-claim from Walker to him, April 12th, 1858; that in 1858 Walker conveyed to Smith and delivered deed Aug 4, 1840, Smith being insolvent, assigned all property, including this. Applied to Court of Common Pleas of Erie Co., Pennsylvania, for benefit of bankrupt law of Pennsylvania, and defendant and one Hoyt were assignees and accepted the trust.

October 6th, 1840, Smith was discharged of his debts by that Court; that Wm. N. Smith made the assignment and delivered deed from Walker to him to defendant to record and keep title straight, and defendant deposited deed with Register of Shiawassee Co. to record, and paid fees, but deed was lost and he has been unable to find same.

After assigning, Smith gave to defendant the following:

"This is to certify that I assign to Chauncey Abbott my right, title and interest to the Michigan farm deeded to me, and situated in Shiawassee Co., and containing one hundred and twenty-three and a half acres.

Hamburg, June 21, 1853.

WM. N. SMITH."

In 1858 Abbott learned his deed had not been recorded and could not be found.

Applied to Walker to quit-claim, which he refused, and again, in April, he and Smith applied and Walker refused, but upon its being urged that defendant was owner, that Hoyt, the other assignee, and Seth Abbott were dead, Walker gave defendant a deed, the one first set forth in answer.

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Denies suppressing deed from Walker to Smith—had no interest so to do, and was the legal owner of the land. Has exercised acts of ownership since August 4th, 1840, on land as his own, and it has been so regarded and treated by Smith. Has paid all taxes, to amount of several hundred dollars, and insists that if decreed not to be the owner he is entitled to repayment with interest on amount paid for taxes, and asks for an account.

General denial of confederacy. General replication.

By the proofs it appears that the land in question was conveyed by patent from the United States, in August, 1837, to Henry C. Walker. That in 1838 Walker conveyed the land to Wm. N. Smith, and deed was delivered to defendant (after below assignment under laws of Pennsylvania) for record, and was in some way lost.

That in 1840, under the laws of the State of Pennsylvania, Wm. N. Smith made a general assignment, including these lands, to defendant and one Hoyt or Curtis.

This assignment was not executed in accordance with the laws of the State of Michigan, but on its face purported to put into the hands of the assignees all the property of the assignor, and though it was not entitled to record it was an equitable transfer of the title to the property in question.

As I find the facts, the recorded title was in Henry C. Walker. He by deed conveyed the same land to William N. Smith, which was not recorded.

William N. Smith assigned under the laws of Pennsylvania, the title to these lands to the defendant and one Hoyt, for the benefit of creditors and in trust for them.

There is no evidence of what was done under this assignment or whether the assignor's indebtedness was ever satisfied or not, nor of what was done with the property.

Some time after the assignment, and after Wm. N. Smith had evidently been discharged by the laws of Pennsylvania, Smith gave to Abbott a release or quit claim which was never recorded and not entitled to record, as follows, to wit: "This is to certify that I assign to Chauncey Abbott and Seth Abbott, all my right title and interest to the Michigan farm, deeded to me, and situated in Shiawassee Co., and containing one hundred and twenty-three and one half acres.

Hamburg, June 21, 1853. (Signed) WM. N. SMITH."

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That before this paper was signed, and pending the proceedings in bankruptcy under the laws of Pennsylvania, the deed from Walker to Smith was given to Abbott to be recorded in Shiawassee Co., and that he gave the same to the Register for record and that either by neglect of Register or some cause unknown, the same was not recorded but was lost.

That August 12th, 1858, Abbott with Wm. N. Smith, went to Walker, and after he, Walker, became satisfied that the deed from him to Smith was lost, and that the title of record was still in him, and that it was for Smith's benefit, other of assignees being dead, he executed and delivered to Abbott a quit-claim deed of the lands, which was duly recorded, and that in the mean time, after the assignment, Abbott had either paid the taxes or bought in tax titles of the land to the amount of several hundred dollars, he being the only one who seems to have been in charge of or caring for the land.

There is no evidence of the fraudulent obtaining of this deed except it may possibly be inferred from the fact that Abbott was a party to the loss of the original deed, knew all the facts and so obtained a deed to himself.

January 15th, 1867, Wm. N. Smith assuming still to be the owner of the lands, in consideration of \$200, gave to Marvin Miller a quit-claim deed of the lands. By this he conveyed only his then present interest and placed Miller in his position.

January 18th, 1867, three days after the quit-claim deed from Wm. N. Smith, Marvin Miller, in consideration of \$500, gave a warranty deed of the lands to the complainant, so placing him in the same position as Wm. N. Smith.

In view of all the facts proved and stated in this case, I am of the opinion that the complainant has no such legal or equitable title as authorizes him to maintain his suit as sought in this case.

The bill must be dismissed with costs but without prejudice as to any other legal or equitable remedy.

JONES v. DIMMOCK.

ANSON JONES vs. STOWELL DIMMOCK.

Where suit is brought on an instrument whereby a party promised to pay a certain sum, in specific articles, in monthly installments at a price named, the production of such instrument is not *prima facie* evidence of an existing indebtedness, but the plaintiff, in order to entitle him to recover, must show, affirmatively, that the defendant has not fulfilled his contract.

The plaintiff on resting his case had not made such a showing as to entitle him to recover, but his evidence offered to rebut the evidence of the defendant, showed him entitled to recover. *Held*, That whether any given testimony is elicited on the direct examination, cross-examination, re-examination or by way of rebutting, the Court will apply it to the issue as presented by the pleadings.

An agreement to pay a certain sum in specific articles at a price named, may be discharged by the payment of that sum of money. Hence, in an action on such a contract, the measure of damages is not the value of the goods at the time of the breach, but the amount of money specified in the contract, with interest after due.

Van Buren Circuit, April, 1871.

Action of assumpsit, upon an instrument of which the following is a copy :

Pine Grove, Feb 4, '69.

For value received, I promise to pay A. Jones or bearer, six hundred dollars, in eight equal installments, monthly, to be paid in lumber and shingles. "A" shingles, \$3 50 per M.; fencing, \$13 per M.; stock lumber, \$12 per M. at the mill.

S. DIMMOCK."

On the trial, the execution of the above instrument was proved, and the same was offered in evidence, whereupon the plaintiff rested

The defendant then testified to the receipt by the plaintiff of lumber, shingles and lath, upon the above contract, amounting, it was admitted by plaintiff's attorney, to \$147 04. He further testified that he was always ready to pay the plaintiff's claim in lumber or in shingles; but admitted that there had been times since the year 1869, that he had not the precise article demanded by the plaintiff but testified that he had at all times either lumber or shingles.—Several witnesses testified that the defendant had on hand, all the time, stock lumber, fencing lumber or shingles.

The plaintiff replied, offering to show that on several occasions he went or sent to the defendant's mill and being unable to procure what he desired, loaded with something else. William R. Surrine,

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Sheriff, testified that sometime between June and August, 1869, Dimmock told him there was a chattel mortgage on the lumber in his mill yard. The plaintiff and his son testified that some time after this, plaintiff had a conversation with Dimmock, who admitted that he had not complied with the contract, and told him, the plaintiff, he need not come for any more lumber but he would pay the balance due the plaintiff in money.

The defendant was then called and denied making any promise to pay the plaintiff money.

Stephenson & Burnum, Attorneys for Plaintiff.

C. L. Fitch, Attorney for Defendant.

By the Court, BROWN, J.—The written instrument offered in evidence in this case is not *prima facie* evidence of an existing indebtedness, and the plaintiff, in order to entitle him to recover, must show affirmatively that the defendant has not fulfilled his contract.

The plaintiff rested his case without showing any breach of the contract. To show such breach he should show a demand and a non-compliance by the defendant, or a refusal by the defendant to comply with the contract.

After the defendant had rested his case, the plaintiff and his son testified that Dimmock acknowledged that he had not been able to comply with the conditions of his contract and would pay the balance in money. This, Dimmock denies; but I think the concurrence of Jones and his son should be credited rather than the statement of Dimmock. While this promise is not to be considered as binding as a new contract, I think it may be taken as an admission of a breach of the contract by the defendant, or as sufficient itself to constitute a breach.

That this proof was made while introducing the rebutting testimony makes no difference. The order of proof is always in the discretion of the Court; and whether any given testimony is elicited on the direct examination, on the cross-examination, re-examination or by way of rebutting, the Court will apply it to any branch of the case or to any alleged facts or theory introduced therein. It therefore follows that the plaintiff is entitled to recover.

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I cannot recognize the rule of damages as claimed by the defendant's counsel, that it should be the value of the goods at the time of the breach. It is true that this doctrine is held by many authorities. See *Tyler vs. Tyler*, 6 Harr. & J. 273; *Davenport vs. Wells*, 1 Iowa, 598, *Edgar vs. Bois*, 11 Serg. & R. 445; *McDonall vs. Hodge*, 5 Hoywood T. R. 55; *Price ads. Instrube*, Harper, 111; *Wilson vs. George*, 10 N H., 445; *Norman vs. Lalay*, 17 Wis., 314; *Doak vs. Ex'rs of Snapp*, 1 Colhwell (Term.) 180; *Williams vs. Jones*, 12 Ind., 561; *Price vs. Spades*, 13 Id., 458; *Parks vs. Marshall*, 10 Id., 20; *Williams vs. Sims*, 22 Ala., 512; *Morris, Ad'm'r vs. Pruther*, 3 Met., (Ky.) 196.

It was the rule of the civil law, as announced by Pothier, (*Poth. on Ob.*, No. 497.) That "all agreements to pay in specific articles are presumed to be made in favor of the debtor, and he may in all cases pay the amount of the debt, in money, in lieu of the articles which, by the terms of the contract, the creditor had agreed to receive, instead of money." In the case of *Trowbridge vs. Holcomb et al.* 4 Ohio St. R., 38, the Court, referring to this proposition of Pothier, say: "With perhaps some qualifications of the generality of this language, this is also the rule at common law;" and they held that an agreement to pay \$1500 in wool, at 20 cents per pound, might be discharged by the payment of that sum of money, and that sum would be the measure of damages if the wool be not delivered.

To the same effect are the cases of *Perry vs. Smith*, 22 Verm., 301; *Smith vs. Smith*, 2 J. R., 235; *Piney vs. Gleason*, 5 Wend., 893; *Brooks vs. Hubbard*, 3 Con. R., 58; *Baber vs. Muir*, 12 Mass. 121; *Metler vs. Moore*, 1 Black., 342.

To my mind, the reasoning of the cases last above cited, is more satisfactory than of the cases taking a different view of the law.

But in view of the testimony in this case it would seem immaterial whether the rule of damages is as contended for by defendant's counsel or not. There is no testimony in the case tending to show the value of the lumber and shingles to be different from that agreed upon by the parties, and in the absence of any proof upon that point the price specified in the contract would, of course, govern as the rule of damages.

SAGER v. HARRISON.

Let judgement be entered for the plaintiff for the balance due him, with interest from January 1st, 1870, to be computed by the Clerk.

JOSEPH SAGER. Appellant, vs. MICHAEL HARRISON, Appellee.

A Justice has no jurisdiction to enter judgment after four days from the day the cause is submitted to him.

A Justice's return showed that the cause was tried before him October 12, 1870, and that he took four days in which to render his judgment—that he rendered judgment October 17, 1870. *Held*, That although the return showed that the cause was decided five days after the trial, nothing appearing in the return to the contrary, the legal presumption is that the cause was not submitted to the Justice for final decision, until after the 12th of October—that the docket entries required by the statute, having been made, and the law not requiring the docket to show when the cause is submitted for final decision, the ordinary presumption in favor of the correctness of official action must support the proceedings.

Kalamazoo Circuit, May, 1871.

Motion to dismiss appeal.

The return of the Justice shows that issue was joined between the parties, and adds, "The said cause was then adjourned until the 12th day of October, 1870, at one o'clock in the afternoon, at which time the parties again appeared before me, and the cause was tried before me without a jury. After hearing the proofs and allegations in the cause I took four days to deliberate upon the matter. After due deliberation I decided no cause of action, and that on the 17th day of October, 1870, I rendered judgment against the plaintiff in the sum of ten dollars and costs of suit."

O. T. Tuthill, for the motion.

Edwards & Sherwood, Contra.

By the Court, BROWN, J.—The grounds relied upon in support of this motion, are

1. The judgment was rendered by the Justice on the 17th of October, while the trial was held on the 12th, or more than five days before the entry of judgment.

SAGE & HARRISON.

2. That the declaration does not state a cause of action.

I do not think the Court upon this motion, can properly be called upon to pass upon the declaration. There is that in the case which purports to be a declaration, and upon which the parties went to trial before the magistrate.

In relation to the first point, the statute requires the Justice to render judgment and enter the same in his docket within four days after the cause shall have been submitted to him for his final decision. *C. L.*, § 3784.

I have no doubt that a judgment rendered by a Justice after the expiration of four days from the day of submitting the cause to him for his final decision, would be a nullity. 19 *Wend.*, 371; 6 *Hill*, 38; 3 *Denio*, 72; 5 *Hill*, 60; 7 *Hill*, 503.

Inasmuch as a Justice's Court is one of limited jurisdiction with such powers only as are conferred by statute, it is necessary that everything pertaining to the exercise of jurisdiction accord with the requirements of the statute, and whatever the statute requires must affirmatively appear, and no mere presumption will be allowed to supply the want of such showing.

The statute requires that certain entries be made in the Justice's docket, and if those entries do not appear, the presumption is that the occasion for such entry never occurred—that the act or acts of which the law requires a record, never transpired. But when the docket entries comply with the statute, the ordinary presumption in favor of the correctness of official action must support the proceedings. *Peck vs. Covell*, 16 *Mich.*, 9; *Rush vs. Whitney*, 4 *Mich.*, 495. The statute, *C. L.*, § 3890, specifies the things which shall appear on the Justice's docket.—Amongst other things, he is to enter the time when the trial was had, the judgment rendered by him, and the time of rendering the same. In making his return to an appeal, he is required to show, amongst other things, the judgment rendered, and the time of rendering the same, but it does not require him to state when the cause was submitted to him. It is often the case that a trial of a cause may be commenced on one day, and not be submitted for final decision until a day or two later. To sustain this motion would be to find that the cause was submitted to the Justice for his final decision on the 12th of October.

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I do not think such a conclusion is *necessarily* to be drawn from the language of the return. This being so, the ordinary presumption in favor of the correctness of official action, must lead us to the conclusion that the cause was not submitted to the Justice for his final decision until the 18th of October.

The motion must be denied.

GEORGE DODGE, VOLNEY P. KIMBALL, BENJAMIN M. AUSTIN AND WILLIAM G. AUSTIN, *ads.* JAMES H. BOSTWICK, Administrator of the Estate of JEREMIAH SYKE, Deceased.

On a first application for a continuance, on account of absence of witness, the following facts should be shown: Materiality of the the testimony, necessity therefor, absence of witness, endeavors made to procure his testimony or attendance at Court, the time when he is expected to return or when the party expects to procure his deposition, and that the application is not made for delay, but that justice may be done.

Kalamazoo Circuit, May, 1871.

Motion for continuance.

The affidavit of one of the defendants shows that one George Baker is a material witness—that he left Kalamazoo in the Summer of 1870, and went to Fort Madison, in the State of Iowa to reside, and has not since returned. The affidavit then says: "And this deponent further says that it has not been possible for said defendants to procure the attendance or the deposition of said witness for the trial of said cause, at the present term of this Court, since the same was noticed for trial. And this deponent further says that it is very important that said witness should be present on the trial of said cause, and that his testimony will be of such a nature that the same cannot well be taken by commission, and that said defendants will use every endeavor to procure the personal attendance of said witness on the trial of said cause;" that defendants expect to procure the attendance of said witness at the next term of Court, and that the application is not made for delay, &c.

Dwight May, for the motion.

O. T. Tutthill, *contra*.

By the Court, BROWN, J.—On a first application for a contin-

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uance, made on account of the absence of a witness, such application should be supported by the affidavit of the party desiring such continuance or by his attorney, and when made by the attorney, should show the reasons why the same is not made by the party. Such affidavit must show,

1. The materiality of the testimony of the absent witness, and that the party cannot, as he is advised, safely proceed to the trial of the cause, without the testimony of such witness. The materiality of the testimony may be shown by swearing to the advice of counsel, (when the affidavit is made by the party,) to whom, it must appear, the affiant has fully and fairly stated the case and what he expects to prove by the witness.

2. The absence of the witness.

3. The endeavors which have been made to find him, or if his residence or stopping place is known, the efforts which have been made to secure his attendance at Court or to take his deposition; the time when he is expected to return or be present, or the time when the party expects to be able to procure his deposition, concluding with the statement, substantially, that the application is not made for delay merely, but that justice may be done.

The affidavit in support of this application is, I think, a substantial compliance with all the requirements indicated, except that it fails to show, unless by inference, that any endeavors have been made to procure the testimony of the witness. It is true that the affiant says "it has not been possible for the defendants to procure the attendance or the deposition of the witness." If this statement be true, a continuance should be granted, but as the affiant does not state the reason for his conclusion, the Court is unable to determine whether that conclusion is warranted. Whenever the law imposes a duty upon a person, such person will not be excused from its performance by simply saying, "It is impossible for me to do it," but he must go further and show that he has made an honest effort and failed.

The affidavit is insufficient, but as the practice in this respect has heretofore been somewhat irregular, the defendants will be permitted to renew their application at any time during this day, without cost.

THE PEOPLE v. MURRAY.

THE PEOPLE vs. EDWARD MURRAY.

1. A count in an information, that A assaulted B with intent to *kill and murder*, without naming the person he intended to kill, held sufficient.
2. A count in an information which charges A with assaulting B with intent to kill C, held bad, on demurrer.

Bay Circuit, April, 1871.

Demurrer to information for an assault by shooting, with the intent to kill and murder.

The first count in the information charges the defendant with an assault upon one Perry, with intent to kill and murder Perry.

The second charges him with an assault upon Perry with an intent to *kill and murder*, without naming the person he intended to kill.

The third charges an assault upon Perry with intent to kill and murder one Williams.

Plea of not guilty to first and demurer to last two counts.

By the Court, MOORE, J.—It is claimed by respondent's counsel that the second count is bad, because it does not show the person the respondent intended to kill, and that the third count cannot be sustained because it alleges an assault upon one person with intent to kill another and different person.

I do not think the demurrer can be sustained as to the second count.

The offense charged is an assault, aggravated by the intent to kill and murder. The act done is alleged with certainty as to time, place and person assaulted, and the intent with which this act was done is distinctly averred.

The respondent is advised clearly of the accusation against him, and I think cannot be prejudiced by the form of pleading adopted. It is a convenient mode of pleading for the People, and cannot embarrass respondent. It is fully sustained by authority. *Arch. Cr. Pr. & Plea.*, 270.

The demurrer to this count is therefore overruled.

If I am right in the conclusion I have reached as to the sec-

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ond count, there can be no necessity for the form of pleading adopted in the third count.

No reason has been suggested on the argument why both forms of pleading should be permitted, and I find no precedent approving of such a practice.

It seems to me entirely useless, and in many respects objectionable.

The demurrer to third count is sustained.

GEORGE W. STEVENSON vs. JAMES W. TAYLOR.

Replevin, under our statute, is a possessory action and may be brought against the agent of a party, if the property is actually in his possession, instead of the principal, whether the original taking of the property was lawful or not.

Kalamazoo Circuit, May, 1871.

R. F. Hill, for Plaintiff.

J. W. Breese, for Defendant.

By the Court, BROWN, J.—In this case the plaintiff sued out a writ of replevin to recover possession of two trunks and contents.

The defendant interposes a plea in abatement, setting up that he received and held the goods as the agent of the American Merchants Union Express Company, a corporation organized under and by virtue of an act of the Legislature of the State of New York, lawfully authorized to transact and carry on the business of an express company and common carrier, in the State of Michigan, and to sue and be sued as such, in this State—and that he retained the goods in question as the agent of said company to secure payment for the charges of their transportation. To this plea the plaintiff demurs. Joinder in demurrer.

The special grounds of demurrer assigned are :

1. For that the said James W. Taylor by his plea aforesaid, has admitted himself to be the person named the defendant in

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and by the aforesaid writ and declaration of him the said plaintiff.

2. And for that the said defendant in and by his said plea has admitted that he was in possession of the goods and chattels described in the said writ and declaration.

3. And also for that the matter set forth in said plea is matter of defence upon the trial upon the merits, and not the proper matter to plead in abatement.

It has been held that in cases of known agency, the principal alone is liable to third persons for any omission or neglect of duty in the matter of the agency. 2 *Com.*, 126; 2 *Denio*, 115; 10 *John*, 387; *Story on Agency*, § 391, p. 518; 15 *John*. 1; 18 *Id.*, 155.

And yet it has been held that an agent or servant, though acting *bona fide*, under the directions and for the benefit of his employer, is personally liable to third persons for any tort or trespass he may commit in the execution of the orders he has received. If the master has not the right or power to do the act complained of, he cannot delegate an authority to the servant which will protect the latter from responsibility. 1 *Chitty's Pl.*, 84. It is true that in *Chapman vs. Andrews*, 3 *Wend.*, 242, it was held that *replevin* would not lie against a receiptor of goods taken by virtue of an execution; but it must be borne in mind that that case was decided upon the ground that *replevin* could be maintained only where trespass would lie; and Chief Justice Savage, in the decision of that case says: "The doctrine of this Court I consider as settled, that *replevin* lies for such a taking as will sustain an action of trespass *de bonis asportatis*." The action could not be maintained at common law unless the original taking was unlawful; and if the original taking was lawful and the detention only was wrongful, *detinue* was the action to be brought.

But "*replevin* under our statute is peculiarly a possessory action; and its primary object is to enable the plaintiff to obtain the actual possession of property wrongfully detained."—12 *Mich.*, 100; *C. L.*, § 5005. It is conceded that the defendant, Taylor, had the custody of the goods. He detained them in his own power, and the detention of property in one's own

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power, is, in law, possession; and it matters not that this power is derived from another and is being exercised in subordination to his will. In other words, when it is said that the possession of the agent is deemed the possession of his principal, it is meant, simply, that the *actual* possession of the agent, if rightful, shall be recognized as the *lawful* possession of the principal. This being so, it follows that if the possession of the agent is unlawful, the principal cannot be said to have a legal possession. With this view of the case it is unnecessary to examine the other points raised by the demurrer.

The demurrer must be sustained.

In the matter of the petition of Benjamin Hartwell, for leave to raise a mill-dam.

Eminent domain is the inherent right necessarily resting in every sovereignty to control and regulate the relative rights of individuals, where those rights are of a public nature, and pertain to its citizens in common. Hence, no constitutional provision is necessary to give it force.

The power of eminent domain may be exercised by the sovereignty itself, or may be delegated. It is for the legislative department to determine what enterprises are of a public and what of a private character.

The provisions of the Act of 1865, "to encourage the erection and support of water power manufactories," (excepting perhaps the last clause of section 5,) are not unconstitutional.

Costs are awarded only by statute.

In proceedings had under the Act of 1865, "to encourage the erection and support of water power manufactories," the respondent is not entitled to costs, except in those cases in which the petitioner moves for a jury, to re-assess the damages reported by the committee, and the jury fail to lessen the damages. The words "fees and expenses" in Sec. 11, embrace only the fees of officers of the Court, and the committee or jury.

Kalamazoo Circuit, May, 1871.

In this case a petition was filed May 28, 1870, praying for authority to raise the dam across the Kalamazoo River, on the land of the petitioner, on Sec. nineteen, (19,) Town two (2) south, range nine (9) west, so as to raise the water of said river 3½ inches higher, making a rise of 8 inches in all. The object was to increase the power to propel additional machinery. The petition shows that the effect of raising the dam would be to over-

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flow certain lands belonging to George K. Field, and also lands belonging to one Andrew McCleary, and that the petitioner had been unable to agree upon the damages to be paid to each on account of the overflowing of their lands as contemplated.—The prayer of the petition was for the appointment of a committee to establish the height of the dam and to assess the sums to be paid as damages for flowing the lands of McCleary and Field, to the end that the “petitioner may acquire the right to flow said lands according to the provisions of the act of March 21, 1865, relating to such cases.” Upon the filing of this petition, an order was entered appointing a committee and directing them to hear and decide the matters contained in said petition, and if said commissioners should be of the opinion that the flowing of the land in the manner proposed would be for public use, to establish the height to which the dam may be built and kept, and thereby the water raised, and the length of time or period during which the same may be kept up during each year thereafter, and to assess the sum to be paid as damages occasioned or to be occasioned by reason of the contemplated overflow of water.

In obedience to this order, the committee proceeded to view the premises and to take proofs, and thereafter reported to the Court that the mill now used by the petitioner is for public use and that the proposed addition would be for public use, and estimated the damages to be paid by reason of the proposed overflow, and find that the dam should be increased $3\frac{1}{2}$ inches, and to be kept up through the entire year.

The petitioner now moves for a confirmation of this report. To this, objection is made by McCleary, on the alleged ground that the act under which the proceeding has been had is unconstitutional.

May & Buck, for the petitioner.

Edwards & Sherwood, for the respondent.

By the Court, BROWN, J.—When the question as to the constitutionality of the act under consideration was first presented, I entertained grave doubts as to how it should be decided.

The effect of a confirmation of this report must be to de-

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prive the respondent, McCleary, of the use of his lands and to transfer the right of its occupancy for a particular purpose to another.

It is not contended that he or any of those under whom he claims title have, by any act of theirs, forfeited the title or the right to the uninterrupted enjoyment of the premises.

Can he be legally divested of his right to the uninterrupted enjoyment of his estate, and if so, by what law? The validity of the enactment under which the petitioner seeks to acquire an interest in the respondent's lands is denied by the respondent, who asserts that it is repugnant to the constitution of the State.

The interests of individuals in property are traceable to the government; and in this country the aggregate body of the people in their sovereign capacity constitute the government. It is true that the government grants to individuals the right to take and appropriate estates as their own; and yet the doctrine has always been recognized that the *eminent domain*, the right which the government retains over the estates of individuals, is a sufficient warrant for resuming such estates for public use.

The title to much of the lands in this country has been derived from the Federal Government and not from the State; and it would therefore seem that the Federal rather than the State government would be justified in the exercise of the power of *eminent domain*. But inasmuch as under our somewhat anomalous or at least peculiar system, each State is charged with the protection of its citizens in their persons and property, it has been held that the character of sovereignty in the State is necessary to enable it to discharge its functions properly in that respect, requires that the power of *eminent domain* shall pertain to and reside in the State government. This being so, it will be seen that the right is founded more in the necessity growing out of our relations to each other and to society than of a mere implied reservation in the grantor, where the government grants the estate. Indeed, I think it is quite as correct to say that *eminent domain* is the inherent right necessarily resting in every sovereignty to control and regulate the relative rights of individuals where those rights are of a public

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nature and pertain to its citizens in common. This being so, no constitutional provision is necessary to give it force. The power is not born of written constitutions but is usually limited by them. It therefore follows that the people, through their representatives are to determine the question as to the propriety and expediency of exercising this right—they are to say what property may be taken for public use, and to declare what shall be deemed public and private uses, limited only by the Constitution.

Judge Cooley in his work on *Cons. Law*, 524, says this right "is the authority which must rest in every sovereignty to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, convenience or necessity may demand."

This power may be exercised by the sovereignty itself or may be delegated. In the case under consideration it is claimed that the power has been delegated.

The respondent insists that the purpose for which the power is invoked, is not of such a character as to authorize its exercise. Does the public safety, necessity or convenience require it?—and by public we do not mean, necessarily, the people of the whole State, county, or even city or township, but the people of a community or neighborhood may be called the public in this sense, and when we speak of a public enterprise we mean such an one as is common to the people—as may be used by them, and opposed to *private*. But what branch of the government is to determine what enterprises are of a public and what of a private character? In the case of *Beekman vs. S. & S. R. R. Co.*, 3 Paige, 73, Chancellor Walworth says: "If the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the Legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain. Upon this point, see the cases reported in 4 Pick., 463; 7 Id., 453, 475, 476; 12 Cush., 477; 1 Chandler, 80.

The object sought in this case by the exercise of the power of eminent domain, is to enable the petitioner to run the

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machinery for a foundry and machine shop, and if it were to be left to the courts to determine the question as to whether the flowing of the lands of another for such a purpose would be for public use, there is no question but that the point is settled in favor of the claim of the petitioner; for in this class of cases the courts have, whether it was necessary to the decision of the cases before them or not, announced in almost, if not every instance, the opinion that the taking of property as proposed, is for the public use. My attention has been called by counsel, to the statutes of Maine, New Hampshire, Ohio, Massachusetts, Connecticut, Tennessee, Kentucky and Wisconsin, similar to the one under consideration, and to the fact that in five of these States these acts to encourage the erection and support of water power manufactories, have been held to be constitutional. It must be held that the Legislature has the power to provide for the taking of property as proposed by the petitioner.

Has that power been exercised in accordance with the requirements and provisions of the Constitution? *Sec. 2, of Art. 18*, requires that "the necessity for using such property, and the just compensation to be made therefor, shall be ascertained by a jury of twelve freeholders, residing in the vicinity of the property, or by three commissioners appointed by a Court of record." *Sec. 3 of the act of 1865, Sess. L. 1865, p. 651*, is as follows:

"The petition, unless the parties thereto shall agree upon the judgment that shall be rendered thereon, shall be heard and decided by a committee of three judicious, disinterested freeholders of the county, to be appointed by the Circuit Court of the county, at such time and place, and with such notice to those interested as the Circuit Court shall order; and if such committee shall be of opinion that the flowing such land in the manner proposed is or will be for public use, they shall establish the height to which such dam may be built or kept, and thereby the water raised, the length of time or period during which the same may be kept up in each year thereafter, and shall assess the sum to be paid to the respondent, by the petitioners for the right to flow such land according to their re-

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port, and make return of their doings to the Court; and in estimating the damages they shall take into account any damages occasioned to any other land of the respondent, as well as damage to the land overflowed, and having assessed such damage, shall make return of their doings to said Circuit Court, and said Court shall add fifty per cent. to said sum as the sum to be paid for such right to flow such land."

It is true that section five of the act provides that on the coming in of the report of the committee, the Court may set the same aside, and may inquire for itself whether the erection of such dam is for public use or not, notwithstanding any finding of the committee. It is argued that this clause is unconstitutional, in that it confers powers upon the Court, which the Constitution requires shall be exercised by a jury or by three commissioners. It appears to me that there is much force in this argument. But as a law may be constitutional in some of its provisions and unconstitutional in others, it is only necessary to inquire whether, for the purpose sought, enough of the independent provisions of the act, not subject to these objections, are to be found to authorize the exercise of the power invoked. Section 3 does not appear to be open to the objection urged, and as the proceedings were had under that section, and as the Court has not been called upon to, nor has it acted under the provisions of section five, I can see no valid objection to the confirmation of the report.

Let an order be entered accordingly.

The report of the committee being confirmed, the respondent, Andrew McCleary, by his counsel, moves the Court for an order that the petitioner pay the respondent's costs and expenses of the proceeding. The motion is based upon two grounds, viz:

1. That by the general statute relating to costs in the Circuit Court, being Chap. 149, *R. S.* of 1846, amended by act approved April 15th, 1871, the respondent is entitled to costs, and

2. That the act under which the proceedings in question were instituted, being Act No. 304, of Laws of 1865, as amended, provides for the recovery of costs by the respondent.

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This Court has already decided in *Lovell vs. Bartholomew et al.*, 1 *Nisi Prius*, 117, that as costs are awarded only by statute, when the statute fails to provide for costs none can be taxed.—Therefore where costs are given by either the general law or the particular statute referred to, the motion cannot be granted.

It is claimed by respondent's counsel that so far as the award of damages by the committee is concerned, the respondent is the plaintiff. But by the statute under which this proceeding is had, the party now moving for costs is denominated "the respondent," and even if the word "plaintiff" in Sec. 3, of Chap. 174, *Compiled Laws*, could be considered as synonymous with the words "prevailing party," it might well be doubted whether the petitioner is not the prevailing party so far as the award of damages is concerned, inasmuch as the petitioner virtually asks leave by his petition to pay to the respondent whatever damages may be awarded to him. And a more conclusive objection to the respondent's claim under the general statute is that Sec. 3 above referred to, provides that "in the following cases" the plaintiff "shall recover his costs," and as no proceeding like the one in question is included in the enumeration of cases in that section, the effect of the words "in the following cases" would seem to be to restrict the recovery of costs to the cases mentioned in the several subdivisions of that section.

Upon an examination of the Act of 1865, before referred to, it does not appear that the Legislature contemplated the payment of costs by the petitioner to respondent except in those cases in which the petitioner should move for a jury to re-assess the damages reported by the committee and the jury should not lessen the damages. In such cases, by a provision contained in Sec. 8, the petitioner would be obliged to pay costs to the respondent.

By Sec. 11, of the act in question, it is provided that "the fees and expenses of the petition shall be paid by the petitioner," &c.—But the words "fees and expenses" in Sec. 11, are evidently used in contradistinction to the word "costs" in Sec. 8, and must, I think, be construed to embrace only the fees of officers of the Court and the committee or jury.

Therefore as neither the general statute, nor the special act in question, provide for the payment of costs to the respondent, the motion for costs must be denied.

ROSE vs. COMMERCIAL INSURANCE CO., OF CHICAGO.

JOHN ROSE vs. THE COMMERCIAL INS. CO. OF CHICAGO.

Bay Circuit, April, 1871.

By the Court, MOORE, J.—The defendant applies for an order transferring this cause to the Circuit Court of the United States for the Eastern District of Michigan, under the act of Congress of 1867, for the reason as alleged, that it cannot have a fair and impartial trial in this Court. *Held*, The defendant having consented to transact the business in this State upon the terms and conditions imposed by our laws, it cannot now ask to be treated as a non-resident defendant, and entitled to the benefit of the provisions of the act of Congress referred to. As to the business in this State, it is to be treated as a resident of the State.

Application denied.

CHARLES A. LORMAN vs. FREDERICK L. SEITZ.

Court.—Rule in cases appealed from Justice's Court.

Wayne Circuit, April, 1871.

Geo. H. Prentiss, for Plaintiff.

Wm. Jennison, for Defendant.

By the Court, PATCHIN, J.—This cause was tried in a Justice's Court and judgment rendered therein for plaintiff for fifty dollars and costs. The defendant thereupon appealed to this Court, where the jury rendered a verdict for plaintiff for twenty-five dollars.

Both parties now claim costs.

The first distinction made between appeal cases and others was provided for in the revised statutes of 1846, by giving costs to the appellant, if the judgment below should be reduced five dollars, and to the appellee if no such reduction was made, al-

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lowing no such discretion to the Court in cases tried by a jury. *Revised Statutes*, 1846, page 410. sec. 170.

The compiled laws of 1857 leave the question of costs in appeal cases entirely to the discretion of the Court. *C. L.*, § 3863.

In 1867 the law was amended so as again to leave the question of costs to depend upon the increase or reduction of the judgment below. *Laws of 1867*, p. 84.

The next Legislature however repealed this law, leaving the question as it had been established in the compiled laws, entirely dependent upon the circumstances of each case. *Laws of 1869*, p. 33.

Each case, therefore, must be determined upon its own merits. It would seem proper, however, to adopt some general plan in regard to appeal cases, so that litigants may understand as near as may be, what to expect in case of defeat in the Circuit Court.

I am entirely clear that, in cases where the amount is unliquidated and submitted to the jury upon the evidence, if the main issue was as to the right of the plaintiff to recover at all; and if the appellant was the defendant upon that issue then although he may succeed in reducing the judgment of the Court below, still he can be in no better condition than if the case was originally commenced in the Circuit Court, and he had succeeded in reducing the claim of the plaintiff, but had failed as to the main issue. It could hardly be expected that in cases depending so much on the judgment of the jury exactly the same verdict as to amount would be rendered upon a second trial even in the same court. It would, therefore, be more in accordance with strict rules of justice to allow costs to follow the result of the main issue in the case unless some particular reason appears in the course of the trial for a different disposition.

As a general rule it would not be proper to allow costs to follow the judgment in this Court in all cases of trivial amounts in favor of the appellant, even if successful, although a different rule might prevail on judgment, in favor of the appellee.

I am unable to see anything in the case at bar to interfere with the rule here suggested.

Costs must follow the judgment.

FARRER vs. HIGHWAY COMMISSIONERS OF SILVER CREEK.

FARRER vs HIGHWAY COMMISSIONERS OF SILVER CREEK.

Held, That the declaration in trespass, in a suit certified to this Court on a plea of title from a Justice's Court, may be amended so as to make the description conform to the description of the premises in the notice attached to the general issue; it being then apparent that when the pleadings were made up in the Justice's Court the error was overlooked by both parties.

The proviso in section 1, of the highway law, that no second application shall be made within twelve months, is not a limitation on the part of the Highway Commissioners, who may act on such second application if they please.

Where the record of proceedings in laying out a highway showed notice of the meeting of the Commissioners to lay out had been served on three persons, but did not show them to be owners or occupants, or who were owners or occupants, the Commissioners had no power to lay out such highway, and their order laying out was a nullity.

Cass Circuit, May, 1871.

By the Court, BLACKMAN, J.—On reading the pleadings, it appeared the premises mentioned in the *Narr.*, differed from the premises mentioned in the notice attached to the general issue, in the use of N. E. $\frac{1}{4}$ for N. W. $\frac{1}{4}$, and that the description in the notice was correct. Upon this state of the pleadings the justification does not answer the charge, and the Justice could not have certified up the case to this Court. It is then clear the mistake was mutual and that the pleadings should be amended so as to raise the issue intended by the parties. This view is sustained by the opinion of Justice Cooley, in *McFarlane vs. Ray*, 14 Mich., 471.

The trespass claimed was committed, if at all, in removing a fence.

Defendants justified, alleging the *locus in quo* was a newly laid out highway, that notice to remove the fence had been given, and the time limited having expired and the fence not having been removed, they, as officers, opened the road by setting to one side the rails across the way.

To show want of jurisdiction the plaintiff offered to show that within twelve months preceding the date of this application, 31st of August, 1870, an application for a road had been made to the Commissioners. The termini of the two roads were not precisely the same, but both were intended to subserve substantially the same purpose. It did not appear nor

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was there an offer to show what the Commissioners had done with the first application.

Section 1, *Session Laws* of 1867, page 255, provides for two things: proceedings by the applicants and proceedings thereupon by the Commissioners. and then adds, "provided that no second application shall be made within twelve months for that purpose."

One of the political duties of a State is the construction of public ways. This duty this State has laid upon towns, which act by their officers, and these last are presumed to perform their duties for the public benefit. A proviso restraining their action in a case within the enacting clause must not be extended beyond the exact letter.

To hold this proviso a restraint upon the public so that no matter how the first application was treated, whether withdrawn, or abandoned, or illegal, or not acted on for any reason, would be to decide a mere nullity should have the same effect to suspend official action and public rights. It seems to me the proviso was meant for the ease of the Commissioners, and that the meaning is, that they shall not be compelled to proceed to lay out, &c., upon a second application made within twelve months after action upon a former one.

In this view, void proceedings will be no bar to future action if they will consent to act.

The Legislature says to them, "You shall not be compelled to proceed, &c., having twelve months before acted on an application for the same road, but, if for any reason, the first application or the proceedings thereon prove to be nullities, you may if you please, proceed."

The record of the proceedings of the Highway Commissioners in laying out the road is quite full, and yet the application does not state the owners or occupants of the land, through and over which the proposed highway was to pass. The notice is not directed to any person and is also silent on this point.—The return on it of service says nothing of service on such persons, and the return of their doings by the Commissioners is equally silent.

In 14 *Mich.*, 528, and 16 *Mich.*, 63, service of the notice of

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hearing on the owners or occupants is said to be essential to jurisdiction. By Section 3, Laws of 1867, page 171, the Commissioners must return their doings, among which doings must be the notice given.

The defendants have furnished no evidence of the service in this case except the words, "due notice having been given," which on the state of this record amounts to saying "no notice was given to the owners," &c.

Instead of this, the return should have said, "having found that personal service," or whatever the service was, "of the notice herewith returned has been made on," naming them, "who are the only owners or occupants of the premises through which the highway is proposed to be laid, at least ten days before the time of the meeting in said notice given, and that such notice has been posted at," naming the places, the same length of time, "being three public places in the township."

In computing the ten days, the day of giving the notice and of meeting must both be excluded.

For want of notice, the laying of this highway is a nullity.

HARRIET SNELL vs. SAMUEL SCOTT.

Where the statute requires service of process a certain number of days before the return day both day of service and the return day must be excluded.

Where, by statute, an act is required to be done in any number of days less than a week, Sunday is to be excluded.

Circuit Judges have no original jurisdiction in cases under the Forcible Entry and Detainer Act, as amended in 1867.

Decided at Chambers, Kalamazoo, May, 1871.

The complainant in this case, made and delivered to the Circuit Judge, a complaint in writing, setting forth that the defendant is in possession of certain described lands of the complainant, in the county of Van Buren, and that he holds the same unlawfully and against the rights of the complainant, and praying for a restitution of the same. Thereupon, on the third day of May, 1871, a summons was issued, commanding the defendant to appear before the

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said Circuit Judge, at the Circuit Court Room in Kalamazoo, in the county of Kalamazoo, on the ninth day of May, at one o'clock P. M., to answer to said complaint.

The summons was served Saturday, May 6th.

The defendant moves to quash the complaint, summons and other proceedings in the cause and to dismiss the proceeding.

Balch, Smiley & Balch, for Complainant.

John B. Upton and *Arthur Brown*, for Defendant.

Opinion by BROWN, J.—Paragraph 4976, of the *Comp. L.*, as amended by *Sess. L.* 1867, p. 88, provides that "The person entitled to the possession of the premises, his agent or attorney, may make complaint in writing and on oath, and deliver the same to a Circuit Court Commissioner, or the Recorder of the city of Detroit, or a Judge of a court of record of the county or city in which the premises are situated, or to a Justice of the Peace of the township where the premises are located," &c.

The following were stated as two of the grounds for the motion :

1. The service of summons was not made a sufficient length of time prior to the return day thereof.

2. That the statute does not authorize proceedings of this character to be had before Judges of the Circuit Courts.

The statute requires the summons to be served "at least two days before the return day thereof." *C. L.*, § 4988. Where the statute requires service of process a certain number of days before the return day, both day of service and the day of the return must be excluded. *Douseman vs. O'Malley*, 1 *Doug.*, 450 ; *Salce vs. Ireland*, 9 *Mich.*, 154. And it seems to be equally well settled that where by statute an act is required to be done in any number of days less than a week, Sunday is to be excluded. *Drake vs. Andrews*, 2 *Mich.*, 203 ; *Thayer vs. Felt*, 4 *Pick.*, 354. Recognizing this as the correct construction of the statute, renders it unnecessary, in order to dispose of the case, to examine the other question presented by the motion.

As the decision upon the question of notice, however, would be but a temporary disposition of the case, it may be well to consider whether the statute confers jurisdiction upon Judges of the Circuit

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Courts to hear cases of this character. By the provisions of § 4 986 proceedings under the "forcible entry and detainer act" might be had before a "Circuit Court Commissioner or Judge of the Circuit or county Court for the county," in which the lands were situated. In 1861 this section was amended by striking out the words "or county," and by conferring jurisdiction upon Justices of the Peace in such cases, in townships or cities where the premises were situated, where no Circuit Court Commissioner holds his office. *See. L. 1861, p. 465.* In 1867, this section was amended as first above quoted, providing that the complaint might be delivered to "a Circuit Court Commissioner, or Recorder of the city of Detroit, or a Judge of a court of record of the county or city in which the premises are located." The Circuit Court is a court of record. But is it a court of record "of the county" within the meaning of this statute? I am unable to find in the statutes or rules any reference to Circuit Courts as "courts of the county"; but when referred to in connection with a county, the language is, "Circuit Court in the county," or "Circuit Court for the county." The fact that the amendment of 1867, does not refer to Circuit Courts, by name, and that the "courts of record" referred to are mentioned as "of the county" is, I think, significant, as bearing upon the question of the intention of the Legislature. The word "of" is defined as being equivalent to "from, or out from: proceeding from, as the cause, source, means, author or agent bestowing; belonging to; pertaining or relating to; concerning." While the word "for," is often used as synonymous with the word "of," it has a broader, and in some instances a different meaning. To do a thing *for* another, is to do it in his behalf, and does not imply, necessarily, any authority derived from the person, or that the person doing the act sustains any relation peculiar to the person for whom the thing is done, or any different relation than that sustained to others. I think the words "of the county," must be construed as pertaining exclusively to the county, and when applied to a court must be held to mean such a court as grows out of and is requisite and incident to a complete organization of the county—a court presided over by a Judge whose official character and authority is limited to the county. Most of our Circuits are composed of a number of counties, and in some instances, the Judge resides at so great a distance from some portions of his Circuit, that

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it would be almost if not quite impossible for a defendant to reach the office of the Judge, on a two day's notice. The Judge of the 11th Circuit, resides at Detroit, while his Circuit is composed of comparatively new counties in the north part of the State, where during some portions of the year the means of conveyance are very limited. These considerations would, at least, furnish a reason for a change in the law; and from the peculiar phraseology of the act of 1867, I can arrive at no other conclusion than that a reasonable and correct construction of this act would be to deprive Circuit Judges of jurisdiction in this class of cases.

The proceedings must be dismissed.

JOSEPH SCOTT vs. HENRY STEARNS.

The authority to tax being regulated by statute, the law must be strictly followed.

Where an assessment roll can not be found in the office of the Supervisor, it is *prima facie* evidence that it never existed.

If the Overseer of Highways neglects to return to the Supervisor, *under oath*, the list of non-resident lands in his district, with amount of labor assessed thereon, and showing that the labor has not been performed or paid, the Supervisor has no authority to spread a tax upon the roll against the land.—Presumption if not found in the Supervisor's office.

Assessment roll not signed, invalid.

There is no statute making tax deeds for tax of 1840, *prima facie* evidence of regularity of proceedings prior to execution of the deed. A paper purporting to be an assessment roll for 1840, signed only by the Clerk, did not authorize the collection of the taxes mentioned in the roll.

The certificate attached to the roll must conform to the statute.

Excessive Tax—Betterments.

Kalamazoo Circuit, May, 1871.

Arthur Brown, Attorney for Plaintiff.

Breese & Grosvenor, Attorneys for Defendant.

Charge of the Court, BROWN, J.—Gentlemen of the Jury: Plaintiff seeks to recover possession of E. $\frac{1}{4}$ of E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of Sec. 5, T. 1 S., R. 12 W., in Kalamazoo County. Defendant admits possession. Plaintiff to show title introduced:

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1. A *Patent* from the United States to Rufus Sheldon, of date May 1, 1839.

2. A conveyance from Rufus Sheldon and wife to Wm. Alcott, dated September 21, 1870.

3. A conveyance from Wm. Alcott and wife to Joseph Scott.

These conveyances appearing in due form of law, I advise you that plaintiff is entitled to your verdict for possession of the premises in question, unless it has been made to appear that he has been divested of his title. For the purpose of proving that, the defendant's counsel have introduced in evidence the following conveyances of the same land made, it is alleged, upon sales of the land for the non-payment of the taxes assessed thereon:

1. Auditor General to Chauncey Pratt, October 20, 1842, for tax of 1838.

2. Auditor General to Chauncey Pratt, April 10, 1844, for tax of 1839.

3. Auditor General to Chauncey Pratt, November 18, 1844, for tax of 1840

4. Auditor General to Chauncey Pratt, December 23, 1846, for tax of 1841.

5. Auditor General to Chauncey Pratt, December 23, 1846, for tax of 1842.

6. Auditor General to Chauncey Pratt, December 23, 1846, for tax of 1843.

7. Auditor General to Chauncey Pratt, December 30, 1847, for tax of 1844.

8. Auditor General to Chauncey Pratt, November 11, 1848, for tax of 1845.

9. Auditor General to Chauncey Pratt, November 19, 1849, for tax of 1846.

10. Auditor General to Chauncey Pratt, January 18, 1851, for tax of 1847.

11. Auditor General to Chauncey Pratt, November 20, 1850, for tax of 1848.

12. Auditor General to Chauncey Pratt, January 17, 1863, for tax of 1857.

The defendant has also introduced in evidence a land contract, of date Sept. 8th, 1863, by which it appears that Pratt agreed to

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sell the land to one Emory D. Rubert. This contract appears to have been assigned to the defendant; also a deed from Nelson Noble and James R. Pratt, to the defendant, bearing date January 12, 1870. Noble and Pratt describe themselves in the deed as the executors of the estate of Chauncey Pratt. It is admitted that at that date, January 12, 1870, Chauncey Pratt was dead, and that Noble and James R. Pratt were his executors in the State of New York. But as there is no evidence as to their authority to act in this State, or to sell the lands in question, I advise you to disregard the deed made by them to the defendant.

The plaintiff insists that the several tax deeds are invalid by reason of certain irregularities in the proceedings preceding the sale of the lands by the County Treasurer. The interests of the State require that burdens should be imposed upon the property of its citizens, burdens to support the government, and enable it to protect the property and persons of such citizens. To compel contributions for this purpose, the Legislature have proscribed certain rules, and have provided that unless the taxes levied upon the lands are paid, they shall be a lien thereon and that unless paid, such lands, or so much thereof as shall be necessary to pay the tax and costs of sale shall be sold. In order, however, to divest the owner of such lands of his title it is necessary that the provisions of the law should be followed. The title of the purchaser at a tax sale is derived not from the ordinary conveyance of the owner, but by the law as prescribed by the Legislature, and if these are disregarded, no title passes. The authority to tax being regulated by statute, the exercise of such authority must be in strict conformity to the law. If the law is not complied with, in the assessment and levy of the tax upon the land, the owner is not bound to pay the tax; and hence a sale of his land on account of his refusal or neglect to pay the tax would be unauthorized and void.

Where a person claims title under a sale or sales made for the non-payment of taxes, he must show, unless by some provision of law such showing is dispensed with, that every step required by law for the assessment and levy of the tax and sale of the land has been complied with. By the statute of 1843, deeds made by the Auditor General, upon sales made for the non-payment of taxes, are made *prima facie* evidence of the regularity

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of all the proceedings required to be had to warrant a sale.— Hence the Auditor General's deeds to Pratt made upon the sale of the lands for delinquent taxes affected by that law must be taken as evidence of title in Pratt, unless some defect or irregularity be shown, such as I shall soon refer to. And I advise you that the plaintiff must show some substantial error affecting injuriously the owner of the land, in the case of each deed, except the deed of 1842 for the taxes of 1838, or he cannot recover. But if defects are shown which go to the jurisdiction of the officers who are charged with the collection of the taxes and sale of the land, the sale would be invalid. It therefore follows that any void tax entering into and forming a part of the consideration of a tax deed, vitiates the whole tax and renders void the deed. Our own Supreme Court have held that the law presumes "officers entrusted with custody of public files and records, will perform their official duty by keeping them safely in their offices. Where a paper is not found, where if in existence it ought to be deposited or recorded the presumption arises that no such paper has ever been in existence." 10 *Mich.*, 260 ; 16 *Mich.*, 139.

Our statutes require that assessment rolls shall be kept by the Supervisors of the several townships, in their office, and when the roll for a particular year is not found there, the presumption arises that such roll never existed.

A statute passed in 1844, and still in force, requires the Overseers of Highways on or before the first Monday of October, in each year, to make and return to the Supervisor, "a list of all the lands of non-residents and of persons unknown which are taxed on his list, upon which the labor assessed has not been paid, and the amount of labor unpaid ; and said Overseer shall make and subscribe an affidavit thereon before some person competent to administer oaths, or before the Supervisor, that the labor assessed upon the lands as returned has not been performed and remains unpaid."

If this affidavit and return is not made, the Supervisor has no jurisdiction to spread a highway tax—and if without such return a highway tax is spread on the lands, the tax deed for that year is void. If such return is not now found in the office of

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the Supervisor, the law presumes it never to have existed.— Therefore if the jury find that there is now no such return and affidavit in the office of the Supervisor, for the years 1844 to 1848, inclusive—highway taxes having been charged against the lands for those years—the law presumes the tax-titles for those years void, in the absence of any evidence showing that such returns were made.

The tax deed for the year 1838, offered in evidence, the sale being made in October, 1842, would not be *prima facie* evidence of the regularity of the tax or of title in the defendant; and in the absence of any evidence tending to show the regularity of such proceedings, you are to disregard the tax-title for that year.

The assessment roll offered in evidence by defendant for the year 1839, without certificate or signature, would render such roll illegal, and the tax for that year void.

There is no statute making the tax-deed of 1840 *prima facie* evidence of title, or of the regularity of the proceedings.

The document offered in evidence on the part of defendant, and called the "assessment of taxes for 1840" being signed only by the Town Clerk, would not authorize the levy or collection of any tax for that year; and if that be the only assessment roll for Alamo for 1840, the tax-deed for that year would be void.

For the years 1842 and 1843, the Supervisor swears he can find no assessment roll in his office. This is *prima facie* evidence that none ever existed, and that the tax-titles for those years are void.

In 1844, 1845, 1846 and 1848, the certificate of Supervisors and Assessors attached to the several rolls given in evidence, in following the form prescribed by statute, omit the words in regard to personal property, "Except in those cases where the value of the same has been sworn to by the owner, his agent or attorney." Where the statute prescribes the form of a certificate, it must be literally followed; and the departure from the correct form in these cases render it fatally defective, and the assessment of taxes for those years void. *See Law: 1843 p. 67, Sec. 19; Rev. Stat. 1846, p. 105, Sec. 21.*

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The calculations given in evidence by the Clerk of this Court, for the year 1842, would, (if you believe his testimony,) show the County, Town and State tax, to be \$0 42, on the basis taken by him, whereas \$1 04 has been assessed. This excess would vitiate the tax if the data taken by him were correct, as given in evidence by town and county records.

The defendant has filed a claim for betterments under §§ 4603 and 4604, *C. L.*, and plaintiff has filed his counter claim under the statute.

The tax for the year 1840, for State and county purposes was five mills. There is evidence tending to show that no town tax was voted for that year. If this be true, the tax levied on a valuation of \$240 would be \$1 20. The tax actually levied is \$1 92. This excess would avoid the tax for that year.

The tax levied for the year 1843, is \$0 45; the calculations made by the Clerk would show the correct tax to be \$0 33.— If these calculations are correct and based upon the amount actually voted for town, county and State tax, this excess would avoid the tax and tax title for that year.

The return of the Overseer of Highways to the Supervisor, offered in evidence, would not authorize the levying and collecting of any tax for that year; and as it appears that a highway tax was levied, and for the non-payment of which the land was sold, the tax-title for that year would be void.

If from the facts in this case you find, upon applying to them the law as given you by the Court, the plaintiff entitled to recover, or those under whom he holds, and that the defendant claiming title by virtue of a sale made for the non-payment of taxes, made improvements, you will then enquire how much more valuable the premises are by reason of the improvements on the premises, made by the defendant or those under whom he claims title.

If you find the land more valuable by reason of these improvements than it would have been had the defendant and those under whom he claims title left it in a state of nature, such increased value should be allowed to the defendant, and the amount in such case should be specified in your verdict; and you may also find what would have been the value of the premises had no improvements been made.

MASON *et. al.*, vs. SLAWSON.

LORENZO M. MASON *et. al.*, vs. AMISI SLAWSON.

Circuit Court Commissioners have no jurisdiction to act as Injunction Masters in cases not pending in the county in which they reside.

Alpena Circuit.

Motion to dissolve injunction.

By the Court, SUTHERLAND, J.—The bill seeks performance of an alleged agreement.

It states that a mutual agreement was made, and then that a synopsis was reduced to writing, which is set forth. This purports to be a proposition for an exchange of lands, on certain contingencies mentioned, to be determined at a time subsequent to that of filing the bill. There is no statement that there was anything afterwards done to render the proposition absolute, nor is it alleged that it was accepted. If accepted and a valid bargain, certain in all its provisions had thereby been made, the bill was prematurely filed, unless the Court could give effect to a contemporaneous, verbal agreement alleged to have been made, modifying and explaining the terms of the written proposition. Such a variation of a written contract concerning lands cannot be relied on. Being contemporaneous with the writing, it is incapable of proof, by a well settled rule of evidence, and being an agreement concerning land, and no past performance alleged, it is void by the Statute of Frauds. The Bill shows no equity.

The injunction was allowed by an Injunction Master of Bay County. It is insisted by the defendant that his allowance of the writ is void.

The office of Injunction Master was created by the statute of 1846. *R. S.*, 427, Sec. 59. The following sections show the territorial jurisdiction of such officers, and the scope of their powers:

“Sec. 59. The Supreme Court shall designate one of the Masters in Chancery to be an Injunction Master, who shall have power to grant injunctions within his Circuit, in the cases provided by law.

“Sec. 60. Such designation shall be in writing, and shall be filed in the office of the Clerk of the Supreme Court of the Circuit for which such Injunction Master shall be designated.

ANONYMOUS.

"Sec. 61. The Supreme Court may by general rules authorize and empower the Injunction Masters, or any of them in their respective Circuits, to hear and determine all such motions, and to make all such orders in suits and proceedings pending as it shall deem proper, and subject to such regulations as it shall prescribe."

The Legislature changed the office, somewhat, in 1847. *Session Laws*, 1847, p. 171. But they continued to be authorized to grant injunctions within their judicial Circuits.

The Constitution, by abolishing the office of Masters in Chancery, abrogated these statutes. Circuit Court Commissioners, since the adoption of the new Constitution, have been empowered to perform the duties formerly performed by Masters in Chancery, and by the act of 1851, entitled "An Act to provide for the discharge of the duties heretofore performed by Injunction Masters," (*S. L.* 1851, p. 277,) it was enacted that a Circuit Court Commissioner in each county should be designated, and being so designated, should be authorized and empowered to do and perform all the duties heretofore performed by Injunction Masters, under such restrictions and regulations as the Supreme Court should prescribe.

It is manifest from these provisions that Injunction Masters under the present statute, are to have the same powers in their counties respectively as such Masters originally had within their Circuits. — He can not act as such in cases not pending in his county.

The injunction must be dissolved.

ANONYMOUS.

Held, An affidavit to entitle a person to an attachment under § 3670, *Com. Laws*, in insufficient to authorize the issue of the writ, in which deponent swore, "he believed the defendant was about to abscond," &c.

A bond for an attachment in a Justice's Court, which has but one surety is irregular, merely and may be amended.

A motion to quash proceedings should state tersely and definitely the grounds of error relied upon.

Berrien Circuit, 1871.

Attachment suit commenced before a Justice.

GRAY vs. KOCH

By the Court, BLACKMAN, J.—This case comes here on special appeal from Justice's Court.

Proceedings were commenced by attachment. The affidavit stated, "Deponent believes defendant is about to abscond," &c.

By *C. L.*, § 3670, the deponent must swear that he "knows, or has good reason to believe," &c. This requires deponent to depose as to facts and belief. Where deponent may swear to good reasons, he must also depose that he believes them. See *Stevenson vs. Robbins*, 5 *Mis.*, 18; *Drake on Attachment*, § 106.

For these reasons the affidavit is a nullity, and the Justice acquired no jurisdiction. The bond had but one surety. This bond is irregular, but the defect is not jurisdictional and may be amended. The justice held otherwise, which is error.

The writ must be quashed with costs.

I can not let this occasion pass without noticing a defect which is bad practice. The motion in this case does not specifically point out the errors, and if the objections had not been fundamental I might perhaps have felt it my duty to hold the motion insufficient, because indefinite. The reasons why an affidavit is void should be stated tersely and definitely, so that no oral additions are necessary to know what the mover finds fault with. It seems the errors were pointed out to the Justice, who disregarded them.

WILLIAM N. GRAY vs. MOSES KOCH.

Whether, upon a motion to dissolve an injunction, after answer, the complainant may read affidavits to contradict the answer,—*quere.*

Injunctions mandatory in substance, though in form merely prohibitory, may be granted.— But to justify this extraordinary process, a case of great urgency, to prevent irreparable injury, and clear of all doubt as to complainant's title, must be presented.

No property can be acquired in words or marks which do not denote the goods or property, or particular place of business of a person. *Held*, accordingly, that no person, by prior use, can acquire an exclusive right to the use of the words "Mammoth Wardrobe," as a sign or designation of a place where a large amount of clothing is kept.

Without a suggestion of falsehood or a suppression of truth, there can be no fraud.

Saginaw Circuit.

GRAY vs. KOCH.

By the Court, SUTHERLAND, J.—The parties to this suit are severally engaged in selling ready-made clothing in the city of East Saginaw. They occupy adjoining rooms in the same block, fronting on Genesee Street.

In March last, the complainant caused to be put up on the wall of the building, over the entrance to his store, the words "Mammoth Wardrobe." Below it, immediately above the door, is the complainant's name in large gilt letters. On the top of the building, in large letters, the complainant has kept for a longer time a sign in these words: "W. N. Gray's Great Wholesale and Retail Clothing Emporium;" and on the windows on either side of the entrance, other words indicative of the complainant's business, including his name. He has also advertised his said place of business and his trade therein, in the local newspapers and the Directory, as the "Mammoth Wardrobe," uniformly connecting with it his name and the number of his room.

Subsequently to complainant's adoption of the words "Mammoth Wardrobe," in his sign and advertisements, the defendant has painted the same words on an awning erected over the entrance to his store, and below them his name, and the number of his room.

The defendant's name, in large gilt letters, is also placed over his door; but above the awning, and on the building, below the awning and near the entrance, is a card displaying "The Mammoth Wardrobe," and defendant's name.

The defendant has advertised in the same newspapers and Directory as complainant, but without mentioning the place of business as the "Mammoth Wardrobe."

The complainant's bill charges that the defendant erected the sign in question for the fraudulent purpose of obtaining, through deception, by means of the identity of name, a part of the custom and patronage attracted to complainant's store by his extensive advertising; which is denied by the defendant's answer, and the complainant insists that his prior adoption and use of that name, "Mammoth Wardrobe," gave him a special property in it, and an exclusive right to use it.

On the filing of the answer, the complainant moves for a preliminary injunction according to a prayer in his bill, pending his motion on the bill and answer, and affidavits made after the answer.—

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The complainant, by way of relief, asks for a perpetual injunction restraining the defendant from using or vending his goods under the name and style of the "Mammoth Wardrobe," and from using any other trade mark or sign on his store substantially the same in meaning, and that the sign used by the defendant may be removed, or destroyed, or delivered to the complainant, for the costs he has been put to.

There is also a prayer for a preliminary injunction of the same restraining effect, and that the defendant may be required to remove immediately from his awning the sign in question.

The defendant objects to the reading of the affidavits. *Smyth vs. Smythe*, 1 *Scamst.*, 252, was read in support of the objection, in which it was held that if the plaintiff moves, after answer, for an injunction to stay waste or analogous injuries, he will not be allowed to read, on any point, affidavits filed after the answer in opposition.

But it was held in *Brydges vs. Stephens*, 6 *Mol.*, 279, that in such cases, if injunction has been obtained, the plaintiff, on a motion to dissolve it, is not precluded from reading affidavits as to acts of waste, against the answer, although filed after it. *Gibbs vs. Cole*, 3 *P. Wms.*, 255; 16 *Ves.*, 49; 1 *Price*, 303; 1 *Ves.*, 543, 1 *John. Ch. R.*, 444; 1 *Smith Pr.*, 596, 600, are to the same effect. In *Sheriff vs. Barnard*, 8 *Sim.*, 161, the same principle is recognized, but it is held that if the facts of waste indirectly bear on the question of title, the affidavits will be rejected. The exclusion of affidavits to support the complainant's title rests also upon other authorities. 19 *Ves.*, 146, 153.

It is said by Mason, J., in *Florence vs. Bates*, 2 *Code R.* 160, that the same principle governs, whether the motion is by complainant after answer for an injunction or by defendant to dissolve it.

In *Poor vs. Carlton*, 3 *Sum.*, 80, a doubt is intimated whether affidavits after answer, contradicting it, will be excluded even on the question of title. 3 *Dun. Ch. Pr.*, 1827, note. Judge Story remarks in that case that, "The practice in America, has, I believe become more liberal than it is in England, and if it were necessary I should not hesitate to admit affidavits to contradict the answer for the purpose of continuing or even granting an injunction, where I perceived that without it irreparable mischief would arise." He further remarked that though there were circumstances in the case he

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was considering which might make it unnecessary to assert so broad a doctrine, yet he preferred "to dispose of the case upon the general ground that the granting and dissolving injunctions in cases of irreparable mischief, rest in the sound discretion of the Court, whether applied for before or after answer, and that affidavits may, after an answer, be read by the plaintiff to support the injunction as well as by the defendant to repel it, although the answer contradicts the substantial facts of the bill, and the affidavits of the plaintiff are in contradiction of the answer."

The question is embarrassed by too many conflicting adjudications to admit of any satisfactory answer without more time than I have now at my command. It is of great practical importance, but not necessary to be settled in this case as will be seen from the view taken of other points.

The defendant resists the motion on two grounds:

1. That the complainant asks for a writ requiring acts to be done—not a mere prohibition.
2. The complainant shows no right infringed by the defendant's use of the sign in question.

As to the first point, it is to be observed that the *gravamen* of the complainant's charge is, that the defendant has erected and continues a sign over the entrance to his store which had been so adopted by the complainant that it indicated the complainant's place of business, and the defendant's use of it drew away the complainant's customers. The complainant asks that the defendant's use of this sign may be interdicted until the hearing of the cause upon the merits. An injunction in the prohibitory form is asked, and also that it contain a mandate to do the act necessary to comply with the prohibition.

An injunction is a preventive remedy, and it has been said that if the injury has been already done, the writ can have no operation, for it can not be applied correlatively so as to remove it. *Att'y Gen. vs. N. I. R. R. & Tr. Co.*, 2 *Green*, 136. The case of the *Peoples vs. Simonson*, 10 *Mich.*, 335, is an instance and a fair illustration of that principle. And in that case the Court say: "No court can by a preliminary *ex parte* order or process turn even a wrong doer out of possession." In *Murdock's case*, 2 *Bland*, 461, the Court held that the object of an injunction before answer, is to preserve all

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things in their then condition, not to determine any right by anticipation, or to undo or restore anything when the essential purpose of the writ is restrained. Precedents are not wanting for framing the writ so as to require active measures to obey it. In *North Eng. Junc. Railway vs. Clarence Railway Co.*, 1 *Coll. R.*, 521, the jurisdiction was boldly asserted. The Chancellor in deciding that case said: "That injunctions mandatory in substance, though in form merely prohibitory, have been and may be granted, is clear. This branch of its jurisdiction may be one not fit to be exercised without particular caution, but certainly it is one fit and necessary to be exercised under certain circumstances. Under what circumstances it should be exercised must be matter for judicial discretion in each several case." *Spencer vs. London & Birmingham Railway Co.*, 8 *Sim.*, 193; *Robinson vs. Lord Byron*, 1 *Brons. C. C.*, 588; *Lane vs. Newdigate*, 10 *Ves.*, 192; *Rankin vs. Haskissen*, 4 *Sim.*, 13; *Whittaker vs. Howe*, 3 *Beav.*, 383; *Eurl of Maxborough vs. Bowen*, 7 *Beav.*, 127; *Milligan vs. Mitchell*, 1 *Myl. & Keen*, 415.

But the opinion of the Lord Chancellor in *Blakemore vs. Glamorganshire Canal Nav. Co.*, 1 *Myl. R.*, 154, shows with what reluctance the Court will exercise the power.

To justify this extraordinary process, a case of great urgency, to prevent irreparable injury, and clear of all doubt as to complainant's title, must be presented. This brings me to the second point made by the defendant. Is this such a case?

A court of equity will relieve against acts of fraud, and in so doing makes frequent use of its writ of injunction. It has exercised this jurisdiction in cases of a fraudulent use of a trade mark, by which the goods of one person are by imposition sold as those of another, or patronage of some sort lost by those who would receive it but for the wrongs by which the patrons are unwittingly deviated.

The complainant has no right to appropriate a sign or symbol which from the nature of the fact it is meant to signify, others may employ with equal truth for the same purpose. 2 *Sandf. R.*, 599. Names having a definite and established meaning in the language, and which do not indicate ownership or origin, or something equivalent, can not be appropriated by one so as to exclude a similar use by others. 7 *Bos.*, 231.

No property can be acquired in words or marks which do not de-

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note the goods or property, or particular place of business of a person. 17 *Barb.*, 608.

These are general principles that are supported by ample authority, and according to them no person by prior use can acquire an exclusive right to "Mammoth Wardrobe," as a sign or designation of a place where a large amount of clothing is kept. As used by the defendant, the term truthfully characterizes his place of business — The words have a definite and established meaning in the language, and do not indicate any person as owner, and if used alone on the defendant's awning would not imply an intention on his part to represent his establishment as identical with that advertised by the complainant.

Without the suggestion of falsehood or a suppression of truth in words or acts, there can be no fraud. But if the words were such that might be appropriated as a trade mark, by having first been arbitrarily applied by complainant, they not being an appropriate term according to general usage to describe such a place, still great doubt might be entertained whether the defendant has not by the addition of his name, number and other marks, so distinguished the designation of his establishment from that of the complainant, that though each is called the "Mammoth Wardrobe" they are not identical or so nearly so as to require close inspection to detect the difference. *Fairbridge vs. Menck, S. & M. Ch. R.*, 622. I do not see how any person could fail to recognize two establishments; in other words it is difficult to believe that any customer attracted by the complainant's advertisements, and guided by the hints which they contain, and seeing his and defendant's stores, could make any mistake, or seeing only the defendant's would be deceived by it.

The motion must be denied with costs

 THOMAS H. REDMOND vs. JAMES E. STANSBURY.

The holder, without indorsement, of a promissory note payable to the order of the payee, may maintain an action thereon in his own name, but without prejudice to the owner's right of set-off or equities existing before the notice of the transfer.

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Swearing upon a promissory note, filing it with the Justice of the Peace at the time of joining issue, and producing it at the trial, is *prima facie* evidence of the plaintiff's ownership of the note.

Error will not be presumed; to be considered it must affirmatively appear.

Jackson Circuit, March, 1871.

Certiorari to Justice's Court.

Suit was brought before J. A. Dyer, Esq., a Justice of the Peace, by the defendant in error, against the plaintiff in error, upon a promissory note, dated November 15th, 1871, signed by the Plaintiff in error, payable thirty days after date, to the order of the Stansbury Oyster Co., at the First National Bank, Jackson, Michigan. The declaration was the usual common counts, and the note itself produced and filed with the Justice in the cause at the time of declaring. Defence, general issue and notice of set-off.

The allegations of error assigned in the case, are as follows:

1. The Justice improperly received the hearsay evidence of John Sharp.

2. The Justice improperly refused to non-suit the plaintiff upon the points taken by the defendant's attorney.

3. The Justice improperly admitted the note as evidence of the indorsement, without proof of the hand-writing of the endorser, and the agency of Goldsmith for the Stansbury Oyster Co., on the ownership of the note by the plaintiff.

4. The Justice improperly allowed John Sharp to appear as the plaintiff's attorney without further proof of his authority.

5. There was no proof to authorize a judgment for plaintiff, and the judgment so rendered by said Justice is contrary to law and the evidence given on the trial of the cause, and is otherwise defective, irregular and illegal.

C. C. Burt, for Plaintiff in Error.

J. D. Conely, for Defendant in Error.

By the Court, HOBBS, J.—The fourth assignment of error is not well taken, as Mr. Sharp's authority is sufficiently proved, and the defendant appeared and made no objection of that kind before the Justice.

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The second assignment of error is not based upon any action before the Justice so far as shown by the return, and besides, the practice of compulsory non-suit does not exist in this State.

The third assignment so far as it refers to the admission of the note as evidence of the hand-writing of the payee by L. Goldsmith, is not based on or supported by the return of the Justice. There is no statement that it was so received or that the handwriting or authority of Goldsmith were in any manner proven, or considered as proven by the Justice.

The case must be considered therefore in that respect as wholly wanting in proof of the endorsement of the note by payee therein.

The fifth assignment of error is in substance that the case made out before the Justice, was not such as authorized him to render a judgment for the plaintiff. That the evidence is not sufficient to support the judgment.

Before considering this I will refer to the subject matter of the first assignment of error, to wit: That the Justice improperly received the hearsay evidence of John C. Sharp. The statement of Mr. Sharp, upon mere information which he received in the case from the plaintiff, is certainly not legal evidence in the case. The only portion of Mr. Sharp's statement that can be considered as evidence, is the statement that he presented the note to the defendant, and his admission of its genuineness—that he was authorized to appear for the plaintiff—the amount of the note, and that he received the note from the plaintiff. This, with the production of the note itself and filing it under the statute must be considered as the only legal evidence in the case. Unless the judgment can be sustained upon this evidence, and without reference to the hearsay testimony, it must be reversed. If it can be, then the plaintiff was not injured by the hearsay testimony, and the judgment should be affirmed. *C. L.*, Sec. 3881, page 1088.

How then does the case stand upon the merits?

The note being filed with the Justice at the time of joining issue, as a part of the plaintiff's declaration, and not denied by the defendant on oath, it was unnecessary for the plaintiff to prove its execution. It was substantially admitted

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There was no evidence of its endorsement by the payee.—The plaintiff cannot therefore be regarded as an endorsee under the law merchant. He held the note, if at all, as an assignee of a chose in action, and the only evidence of the assignment to him of the note is his possession of it, and its production by him in pleading and at the trial.

It is claimed by counsel for defendant in error that an assignment of the note need not be in writing; that delivering for a proper consideration is sufficient, and that possession of the note by the plaintiff and his production of it on the trial, is *prima facie* evidence of such delivery, and that under the law of 1863, suit may be maintained in the name of the assignee.

That the assignment may be by delivery for a valuable consideration and without writing, is abundantly sustained by authority. 1 *Parsons on Contracts*, 197; *Id.* 192; 12 *J. R.*, 346; 17 *Id.*, 284; 19 *Id.*, 95 and 342; *Jones vs. Winter*, 13 *Mass.*, 305; *Franklin B'k. vs. Raymond*, 3 *Wend.*, 69.

The decisions in the two last cases were both where promissory notes payable to the payee or order, were transferred by delivery merely, without endorsement. It was held that such delivery was a sufficient assignment to transfer the title of the note to the holder, but that he acquired none of the peculiar rights of an endorser under the mercantile law. That he held the note subject to all equities of the maker against the payee, and could not maintain a suit in his own name. In short, he held it with the same rights which would attach to the assignee of any other non negotiable chose in action, and no more.

Mr. Justice Parsons, delivering the opinion of the Court in 13 *Mass.*, says: The facts of the assignment may as well be proved by witnesses as by the name of the payee on the back of the paper, when the person claiming to be assignee holds the paper and proves it was delivered to him in consideration of money or other valuable thing paid for it."

In the 3d of *Wendell*, referred to, the decision was upon a promissory note payable to Bailey or order. Bailey procured the Hoboken Bank to discount it and delivered it to the bank, but through accident it was neglected to be endorsed by him, and he died before its maturity. Marcy, J., in delivering the

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opinion of the Court, says, that "he, (Bailey,) had therefore parted with his interest in the note, and the bank had acquired what interest he possessed in it. The holders stood in the relation of assignees of a chose in action, and not endorsees, and held the note subject to the equities existing between the original parties."

The act of 1863 referred to, allows the assignee of a chose in action to maintain suit in his own name, but still subject to all equities existing between the original parties. The only effect therefore of this statute is that the suit may be brought directly in the name of the assignee and not necessarily in the name of the payee, for his use, the right of the maker as to any offset or other defence he may have against the payee being unimpaired.

It is not correct therefore as argued by counsel for plaintiff in error, that by the proceeding in this case, the defendant (plaintiff in error) was prevented from making any defence he may have had against the original payee. No evidence of such defence was offered, and consequently no ruling was made by the Justice on that point. If such evidence had been offered, it would have been the duty of the Justice to receive it. The case cited in 18 *Iowa Reports*, page 143, *Yinkers vs. Martin*, where there is a similar statute allowing the assignee of a chose in action to sue in his own name, very fully sustains the position above taken.

The only remaining question is whether there should have been proof of the actual transfer and delivery of the note to the plaintiff, for a valuable consideration paid, or whether the possession of the note by him and its production on the trial, was sufficient *prima facie* evidence of such assignment and transfer in the absence of any circumstance to cast suspicion upon his being a *bona fide* holder.

It will be found, I think, that those cases which place the rights of the assignee upon the fact of delivery for a proper consideration, do so with reference to the right of the maker to assert and maintain his equitable or legal defence against the assignor. He will not be debarred from making such defence simply on the fact of the assignment, although he may be notified of it. His rights as against the payee will not be affected

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unless the transfer was for a valuable consideration, so as actually to transfer to the assignee all the rights legal and equitable of the assignor. If he has no defence as against the payee or is protected in his right to set up such defence, what interest has the maker in the question as to who shall hold the claim or be his creditor?

His interests are in no manner affected. It is indifferent to him whether he pays or accounts to one or the other. The only question material to him, therefore, is whether in fact the note has been referred by the payee. It is wholly immaterial to him whether such transfer was for a consideration or without consideration, because if actually transferred by delivery or otherwise, he will be protected in paying it to the transferee or assignee, whatever the transaction may have been between the payee and the assignee.

The general rule is well established that possession of chattels is *prima facie* evidence of ownership. Why should not the same rule apply to choses in action? Upon what principle can it be contended that possession of a horse or watch is evidence of ownership, that will not equally apply to a promissory note or other chose in action? It seems to me the reason of the rule is as strong in favor of the latter species of property as the former, and Chief Justice Parsons, in *13 Mass.*, referred to, says there is no reason why a contract may not be assigned by delivery and without writing as well as a personal chattel. If so, possession of the one must be equally evidence of such delivery as the possession of the other.

The case of *King vs. Gottschalk et al.*, 21 Iowa, 513, fully sustains this view. In that case the plaintiff showed no right to the note, (it being payable to the order of another and not endorsed,) except simply possession and production on the trial, as in this case, and the Court, Judge Dillon pronouncing the decision says: "Being in possession of the note, suing upon and producing it upon the trial, this was *prima facie* evidence of the plaintiff's ownership of the note, and sufficient evidence if nothing further was shown, to justify a recovery upon it."

This disposes of the objections raised to the proceedings before the Justice in this case. It shows that independently of

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the hearsay testimony of the witness, J. C. Sharp, and entirely excluding it from consideration, the judgment was not erroneous, and therefore the plaintiff in error was not and could not be injured by that evidence. If this were not so, it is difficult to see how advantage could be taken of the improper evidence as the return of the Justice stands. It appears that after the hearsay evidence was taken, the defendant's attorney objected, but there is no statement whether that objection was sustained or overruled, or whether that evidence was considered in deciding the case or not. It does not appear affirmatively, therefore, that any erroneous ruling was made upon that objection by the Justice. Error cannot be presumed; it must affirmatively appear, to be considered as error.

The judgment of the Court below must be affirmed, with costs.

[See *Zeller vs. Harris*, 1 Mich. Nisi Prius, 75.]

THE MICHIGAN NISI PRIUS.

JULY, 1871.

PATRICK DUHIG vs. NELSON LIPSCOMB.

To give the Circuit Court jurisdiction in case of appeal from a Justice of the Peace, there must have been a *final judgment* rendered by such Justice of the Peace.

An order by the Justice "that plaintiff retain the property by paying the charges on them and that defendant pay the costs of suit," is not a *final judgment*.

Josco Circuit, June, 1871.

W. T. Cummings and *Taylor & Wheeler*, for Appellee.

John Hurst, for Appellant.

Motion by appellee to dismiss appeal.

By the Court, GRIER, J.—This cause was appealed by defendant from a Justice of the Peace. The action was replevin for a stove and other personal property. The plea, so far as can be ascertained, from the return, set up a lien upon the property claimed, for the amount of freight earned in carrying the property, and for the warehouse charges.

The only judgment rendered by the Justice, was as follows:

"After hearing the evidence in the above cause, it is ordered by the Justice, that the plaintiff retain the stove and stove pipe by paying the charges on them, and defendant pays the cost of the suit taxed at three dollars and ten cents."

We may infer that the Justice intended to find that the defend-

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ant had a lien upon the goods, but he has not found the amount of the lien.

No order or adjudication of a Court can be said to be a *final* judgment if it leaves anything necessary to the execution of the judgment unascertained.

The order in this case is conditional.

The plaintiff may retain the property by paying the charges on it. But how much are the charges on it? The amount of the charges the judgment does not fix in terms, nor give any standard by which they can be ascertained. A disputed point remains unsettled.

A Justice's Court has no power or process to enforce or execute such a judgment.

Again, if the defendant had a lien for his charges, he does not unlawfully detain the property, and the judgment could not lawfully be for the plaintiff, neither could the defendant be required to pay the costs.

The judgment should have been in form for the defendant for the amount of his lien and costs. But instead of this the Justice makes a *decree* entirely inconsistent with itself, that the plaintiff retain the property by paying the charges on them, and the defendant pay the costs, whether his charges be paid or not.

In other words, he finds in substance that the writ was wrongfully sued out, that defendant was lawfully justified in retaining possession of the property, but that he should be mulcted in costs for setting up a legal defence.

This is not a mere erroneous judgment, but it is no judgment.— It is only where *final judgment* has been rendered that a cause can be appealed, and without such judgment the Circuit Court does not obtain jurisdiction.

The appeal must be dismissed with costs.

HORACE FLANDERS vs. HENRY CHAMBERLAIN.

Courts of equity will not entertain a bill to compel offsets of unconnected, independent debts. Relief, by way of compelling set-offs, will only be granted where it appears that the accounts or claims of the parties are mutual and dependent.

Case Overruled, June, 1871.

FLANDERS vs. CHAMBERLAIN.

The bill in this cause was filed December 2d, 1868. The complainant alleges, that on the 29th day of February, 1868, he was employed to farm the lands of the defendant; that to enable him to carry on the farm, the defendant sold him certain personal property, and became surety for him by signing notes given to other persons for personal property bought of them; that the amount of both liabilities so created was about \$850 00; that to secure the defendant the complainant executed to the defendant a chattel mortgage upon certain personal property. The complainant further alleges that the notes signed by the defendant as surety, have been paid by him; that the debts due the defendant, were as follows: One promissory note of date December, 1866, for \$110, due October 1st, 1868, with interest at ten per cent—the consideration thereupon being a certain sorrel horse, mentioned in the mortgage referred to. One note for \$220 50, due, without interest, December 1st, 1868, and one note for \$107 00, dated February, 1868, and due, without interest, January 1st, 1869, the consideration for which, was the wagon described in said mortgage. The complainant further alleges that on the 11th of November, 1868, there was due on the notes to the defendant, about the sum of \$446 66; that on the same day the defendant was indebted to him upon an award, dated November 5th, 1868, \$365 22, payable on the said 10th day of November; that to satisfy the chattel mortgage by the payment of said three notes, he, on the said 10th day of November, tendered the defendant the sum of \$365 22, by offering to offset the same to that amount on complainant's indebtedness to him, and the further sum of \$81 44, the balance then due him on said mortgage, by offering to him the sum of \$90 00 in legal tender notes, requesting him to take balance due him out of said sum, which, he alleges, the defendant refused to accept, and that he thereupon sold to one Conden, the wagon mentioned in the mortgage. Nevertheless, the complainant claims that the defendant conspired with one Huntley, and one Burdick, and that they, on the 20th of November, 1868, took and carried away the wagon from the possession of said Conden, and one gray horse, one sorrel horse and one set of harness, some of the property described in said chattel mortgage, and secreted the same; that on the 28th of November, 1868, Huntley gave the complainant notice of the sale of the property, a copy of which is annexed to the bill.—

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The bill further sets forth that on the 30th of November, 1868, the defendant took possession of forty fat hogs, (parcel of fifty hogs mentioned and included in said mortgage,) by virtue of said mortgage, and that he held them with the intent of selling or otherwise disposing of them: that the value of the property taken by defendant was \$815 00. The complainant alleges that the horses, harness, wagon, and his undivided interest in the forty fat hogs, were then free and clear from the lien of the chattel mortgage, and that the taking them from the town of Jefferson, where they then were, to the township of Howard, and there offering them for sale, was contrary to the terms of the mortgage, and was done for the purpose of oppressing and defrauding the complainant. The complainant prays that the Court decree that the lien of the mortgage upon the property so taken be declared satisfied and discharged, and that the defendant be ordered to return the property, and that he be enjoined from selling or disposing of the horses, harness, wagon, and the complainant's undivided half interest in the forty fat hogs. An injunction was thereupon granted, but on the coming in of the answer was dissolved.

The answer states the indebtedness of the complainant, admits the taking of the property by virtue of the mortgage, but denies that he was indebted to the complainant on an award to the amount of \$365 22, on the 10th day of November, 1868. The answer further states that the defendant is worth at least ten thousand dollars.

Daniel Blackman and *Edward Bacon*, for complainant, in support of the position that this is a proper case for the exercise of equity jurisdiction, say:

"There is no doubt that relief exclusively equitable is prayed for by the bill, to wit: the extinguishment or cancellation of the mortgage. Cancelling writings, is that from which Chancery derived its name.

"The tender was after default in the mortgage, when by the cases cited on the defence, the only relief was in equity. See cases cited by defendant's counsel, *Tannahill vs. Tuttle*, 3 *Gibbs*, p. 110; *Van Brunt vs. Wakeler*, 11 *Mich. Rep.*, 177; *Story's Eq. Pr.*, Sec. 1031.

"The whole nature of the case is such as shows oppression equal to fraud, from which relief is sought.

"There is no demurrer or claim of advantage equal to demurrer.

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and although it should be admitted that the remedy at law is adequate and plain, the defendant is rightly subject to the decree of this Court. This is plainly asserted by the case cited by the defendant's counsel—*Bennet vs. Nichols*, 12 Mich., p. 22. See also *Underhill vs. Van Cortlandt*, 2 John. Ch. R., 339; *Le Roy vs. Platt*, 4 Paige, 81; *Livingston vs. Livingston*, 4 John. Ch. R., p. 290.

"It is competent for this Court where it has acquired jurisdiction for the purpose of granting an injunction, to retain the suit for the purpose of giving damages to the complainant. *Brown vs. Gardner*, *Harrington Ch. R.*, p. 291. The Court acquiring jurisdiction for one object, may, even though the principal relief be refused, retain jurisdiction to give damages under the general prayer. This is expressly decided in *Carrol vs. Reed*, *Walk. Ch. Rep.*, (Mich.) p. 381.

"The Court having obtained jurisdiction for one purpose may retain it to give full relief and might decree a return of the property mentioned in the chattel mortgage to the complainant's possession. Expressly decided in *Whipple vs. Ferroo et. al.*, 3 Gibbs, 437, and if possession could be decreed or damages, as aforesaid, of course, the property being long ago marketed, the defendant can be decreed to account, no prayer for special relief being necessary in any case. 1 Barb. Ch. Practice, p. 37.

"The tender was sufficient in equity, if under all the circumstances of the case the defendant ought to have accepted of it, or failed to base his alleged refusal of acceptance on any valid reason. *Bellinger vs. Kitts*, 6 Barb. Sup. C. Rep., 273; *Stephenson vs. Maxwell*, 2 Coms., 415."

"In 12 Mich., 45, we have a case where complainant acquired his rights after a foreclosure decree, and filed his bill to set off payments against. If we substitute forfeiture for decree, our and this case is strikingly similar. It was the legal duty of Griggs to have paid the incumbrances. He did not do it; complainant did. See p. 51. at bottom.

"The grounds for jurisdiction were two: (p. 52.)

"Insolvency, which alone is inadequate. *Hale vs. Holmes*, 8 Mich., 37.

"2. Inadequacy of the legal remedy. We have no legal remedy.

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"In *Lockwood vs. Beckwith*, 6 *Mich*, 168, and *Brackett vs. Sears*, 15 *Mich*, 244, we have the principles of equitable set-off.—From these cases it appears :

"1. That when the Court has jurisdiction of the case it will enforce a mere legal set-off as a foreclosure case. See 10 *Mich*, 117. The incumbrances were not set off, because not paid. In 12 *Mich*, 45, they had been paid, thus showing they would have been a good set-off if paid in the first case.

"No equitable grounds are required where the Court for other reasons have acquired jurisdiction.

"2. Where the equity attaches to the demand, and not to the person. 6 *Mich*, 175; where there is mutual credit, as when Flanders owed Chamberlain and worked for him without asking payment, and without an offer by C. of payment. F. swears he supposed he was paying off the debt by his work. C. does not deny there was acknowledge of this credit being the means of discharging the debt on the notes. He swears there was no contract to set off.

"In 15 *Mich*., it is said from the nature of the dealings, and the course of their accounts, it was evidently considered by the parties the accounts were *dependent*.

"It may be said these are cases of defenses. The case in 12 *Mich*., was of a bill filed. That which is a good equitable defense is good ground for a bill generally.

The reason why a bill for a mere legal set off is not sustainable, is, that there is an adequate and full remedy in a suit at law. Plaintiff can sue or wait till he is sued. But against a sale or chattel mortgage there is no such remedy."

Franklin Muzzy and H. H. Coolidge & Son, for the defendant, insist :

"1. This is not a bill to redeem. The essentials of such a bill are wholly wanting. *Beek vs. Frost*, 18 *John. R.*, pages 544, 559, 570!

"It does not pretend to be a bill to redeem, nor of any such nature. It avers that by the tender, Chamberlain's lien under the mortgage was destroyed. He asks the Court to so say and to order the return of the property.

"2. The bill makes out no case of equitable jurisdiction.

"The bill shows there had been a forfeiture in the payment of

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the \$110 note. This note was due October 1st, 1868. The tender was made November 10th, 1868, and Chamberlain had good right to reduce the property to possession.

"The complainant shows by his bill that he had a perfect legal remedy. If by the tender the lien was destroyed, the property became Flanders'. There was a perfect remedy by replevin or trover.

"The statutes of set-off were made to give defendants the privilege of setting off their claims against the plaintiff's claims. But here the complainant seeks to compel the defendant to set off, and this he does without showing the danger of any loss, any irreparable mischief or injury. He does not aver that the defendant is insolvent.

"Chamberlain's claim is disputed. The liability of Chamberlain on the award is uncertain. A court of law should settle that question. If the award is valid, then Flanders' remedy is complete and adequate at law.

"In a suit at law, Chamberlain would be under no obligations to set off his claims against it. How can this Court compel him to do it?

"Courts of equity do not take jurisdiction to compel offsets of unconnected debts, generally. There must be some special grounds for relief, such as mutual credits on the faith of the debts. *Dale vs. Irwin's Ex's*, 2 How. U. S., 146.

"No such mutual credits are alleged in the bill. There is no such pretence there set out. There is nothing peculiar about it.—It is a naked claim on the one part and on the other.

"Where there are mutual demands, a court of equity will sometimes interpose to set off one demand against the other; but if the demand sought to be set off is not of a nature to give a court of equity jurisdiction, there must be some connection between the demands to justify the jurisdiction. *Picson vs. Micux*, 3 A. K. Marsh, 933.

"Neither of the demands in this case are of such a nature as to give the Court jurisdiction. One is of simple promissory notes—the other is an award.

"Before the alleged tender, Chamberlain had become the absolute owner of the mortgaged property. *Patchen vs. Price*, 12 Wend., 61; *Brown vs. Bennett*, 8 John., 96; 40 Barbour, 179; *Thurber vs. Jewett*, 3 Gibbs, 298.

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"*Van Brunt vs. Baker*, 11 Mich., 177, does not change the doctrine."

By the Court, BROWN, J.—The Court in delivering its opinion on the motion to dissolve the injunction, assigned as reasons why the motion should be granted:

1. That the complainant covenanted in the mortgage to pay the debt mentioned therein. The law implies that it is to be paid in money, and this was the plain intention of the parties.

2. That though in suits which are actually pending in a court of equity the defendant may offset a claim or demand, yet where persons have mutual demands or claims against each other, and one refuse to accept a tender of offset, equity will not interfere to enforce such tender and demand of offset.

If these views of the case are correct, it is clear that the bill should be dismissed, for there is nothing in the proofs to take the case out of and beyond the operation of the rules of equity indicated by the Court.

I shall therefore consider, first, the views of the Court as announced in the decision upon the demurrer.

By the provisions of § 3480, *C. L.*, it is provided that in suits in equity "for the payment or recovery of money, set-offs shall be allowed in the same manner and with the like effect as in actions at law."

The complainant insists that the object of the bill is "to substitute for the legal contract, the mortgage, or true state of affairs between the parties;" while the defendant insists that the bill seeks to "set off one legal debt against another legal debt," and that a court of equity cannot be properly called upon for this purpose.

The case of *D. & M. R. R. Co. vs. Gregg*, 12 Mich., 45, is claimed by the defendant to be somewhat analogous to the case at bar. In that case the complainant had purchased real estate and gave back a mortgage to secure the purchase money. The deed contained covenants against incumbrances. At the time of the conveyance there were two mortgages upon the premises. Proceedings were instituted to foreclose the mortgage given by the railroad company. The company, in view of the covenants in their deed, sought to have the amounts of the former mortgages deducted from their indebtedness. This claim was disallowed, and a decree entered

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against the company. After the entry of this decree the company paid off the prior mortgages, and then filed a bill to have the sums so paid, set off and deducted from the amount of the decree. The Court entertained the bill and granted the relief prayed for. It is true that it appeared in this case that the grantor was insolvent, which, under the circumstances, would be ground for the interference of equity; but an examination of the case shows that the Court did not put it upon that ground, but only referred to the fact of insolvency as an *additional* reason for the exercise of equity jurisdiction. The ground for the decision was, simply, that the railroad company might indemnify itself out of the purchase money it was still owing, through the intervention of equity, instead of bringing a suit at law against the grantor on his covenant against incumbrances. The mortgages were a lien upon the land, and if not paid would, by foreclosure, operate to divest the railroad company of title, and take from it a title which the grantor had covenanted to defend. The agreement of the parties was, that the grantee should have an unincumbered title. To aid in carrying out this agreement, a court of equity might properly exercise jurisdiction. If no conveyance had been made, but simply a contract to convey, equity would compel a specific performance of the contract. As equity will interpose to enforce agreements, so it will give relief where a party, to protect his own rights, does that which another in good conscience was bound to do for him.

Where a party executes an ordinary warranty deed of lands and takes a mortgage back, to secure some portion of the purchase money, the covenants in the deed are, in one sense, the consideration for the money paid, and for the mortgage and accompanying obligations. Hence if it turns out that there is a prior incumbrance on the land, and the purchaser pays the same, the consideration as between grantor and grantee is affected to the extent of such incumbrance. To illustrate: The value of the premises, free from all incumbrance is one thousand dollars. Upon the representations of the grantor that the premises were unincumbered, the grantee undertakes to pay therefor one thousand dollars. It subsequently appears that there was an incumbrance of five hundred dollars upon the premises. It is the business of the grantor to procure a discharge of this in-

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cumbrance. If he does not, there is, to that extent, a failure of consideration as between him and his grantee, and if the grantee is put to expense on that account, it is quite clear that when the grantor seeks to recover upon his mortgage, a court of equity would say, " You procured this mortgage upon certain representations. Those representations were not true. It has cost the mortgagor five hundred dollars to procure such an interest as you covenanted to convey to him. You shall now make him good by endorsing upon your decree that sum."

The reason why, in the case in 12 *Michigan*, the complainant was allowed to file its bill to procure a set-off against the decree, was, that it was not, until then, in a condition to insist upon such set-off, not having paid off the prior mortgages until after the entry of the decree referred to. It was, as I infer from the language of the second paragraph, at page 46, of that case, upon a showing of these facts by petition, that an order was entered permitting the complainant who had, upon the proceeding to foreclose its mortgage, endeavored to have the prior mortgage set off and deducted from its mortgage, to file its bill.

In the case at bar, I am unable to discover any relation, connection or dependence between the accounts and claims of the parties. In the absence of such relation or dependence, I am at a loss to perceive how a court of equity can be called upon to interfere. " Courts of equity do not take jurisdiction to compel offsets of unconnected debts " The bill does not allege that the debts and credits were mutual and dependent, nor does the proof show such to be the case. With this view, it is unnecessary to consider the other questions involved.

Let an order be entered dismissing the bill.

JASPER N. DODGE vs. EDWIN CORBIN.

No issue roll is required in *certiorari*, and hence no fee can be taxed for making one.

The plaintiff in error, in *certiorari* cases, is entitled to an attorney fee of \$15, in case the judgment is reversed.

Sub. 5, of Sec. 1, Act 28, S. L. 1869, has no application to *certiorari* cases.

Kalamazoo Circuit, May, 1871.

DODGE vs. CORBIN.

R. F. Hill, for Appellant.

H. C. Briggs, for Appellee.

By the Court, BROWN J.—This is an appeal from the determination of the Clerk, in the taxation of costs.

The appellant is plaintiff in error, and brought the original cause into this Court, upon *certiorari*, from Justice's Court.

The judgment of the Court below was reversed, whereupon plaintiff in error presented to the Clerk, for allowance and taxation, the following

BILL OF COSTS.

Attorney Fee: For proceedings before trial.....	\$10 00
After notice and before trial.....	5 00
Trial of issue of law (<i>certiorari</i>)—judgment reversed.....	15 00
County Fee.....	2 00
Clerk's fee.....	5 31
Commissioner's fee on allowing <i>certiorari</i>	2 00
Issue Roll, 75 folios, at 10 cents per folio.....	7 50
Witness fees on trial in Court below:	
James De Abram, 2 days and 22 miles travel	2 32
Samuel C. Cavanaugh 4 days and 40 " "	4 40
Justices fees, as taxed in Court below.....	3 90
Constable's fees in Court below.....	35
Affidavit to Fee Bill.....	25
Taxation of costs.....	25
Total,	<hr/> \$58 28

The appellee (defendant in error) objected to the item charged for issue roll, to the costs in Justice's Court in excess of \$7 34, and to the taxation of an attorney's fee exceeding \$15.

Rule 97 provides that "the party having the affirmative of the issue, and bringing the case to trial or hearing, shall prepare an issue roll containing copy of the pleadings and any notice of set off or of special matter of defence which may have been given under the general issue, and such roll shall be used on the trial or hearing instead of the original files in the cause, and such

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original files shall not be removed from the Clerk's office to be used on such trial or hearing without the special order of the Court."

Rule 98 provides that if the party required to prepare such roll shall recover costs in the suit, he shall be entitled to tax as a part thereof, 10 cents for each folio of 100 words contained therein.

The issue roll referred to, is to contain "a copy of the pleadings, and any notice of set off or of special matter of defence which may have been given under the general issue." The plaintiff in error claims that the issue roll in this case consists of his affidavit with assignments of error and the Justice's return. The simple statement of the claim in connection with the language of the rule, would seem sufficient to justify the conclusion arrived at by the Clerk, that the claim should be rejected. The plaintiff in error was compelled to make his affidavit in order to procure his writ. The Justice made his return and the hearing was had upon the original papers.

Paragraph 3980, *C. L.*, referring to the Justice's return in such cases, provides "that where such return shall be so filed with the Clerk, the cause may be brought on to argument, at any term of the Court thereafter, without any assignment and joinder in error, unless there be an allegation of error in fact, and without furnishing any other copy or copies of the affidavit, *certiorari* and return to the Court, or the opposite party than those filed with the Clerk."

The costs in the Court below, \$10 99, are admitted to be excessive, and the Clerk taxed the same at \$7 34.

Subdivision 5, of section 1, of act number 28, *Session Laws* of 1869, provides that the prevailing party shall recover his costs for proceedings before notice of trial, in "all other civil actions at law," (*i. e.* those not otherwise provided for,) \$10, and for all subsequent proceedings before trial, \$5, and it is under this provision that the plaintiff in error claims the right to have taxed the first two items in his bill.

We understand an action at law to be the legal demand of one's rights, or the form given by law for the recovery of that which is due. The proceeding by *certiorari* is designed to cor-

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rect errors in the adjudication or determination of the matters in controversy between the parties, and is unlike ordinary actions at law, in that by it questions of fact are not determined, but the law is applied to the facts exhibited by the record. It would thus seem that the 5th subdivision of section 1, could not have been intended to apply to cases of *certiorari*. That it was not intended is evident by reference to the 10th subdivision of the same section, which provides that in all cases of *certiorari* to a Circuit Court, the plaintiff in error on reversal of the judgment shall recover \$15 00. This must be deemed conclusive, and the first two items in appellant's bill should be stricken out.

The Clerk committed no error, and his decision should be affirmed.

THE DETROIT, HILSDALE & INDIANA R. R. Co. *vs.* HENRY YOUNGHANS.

Service of garnishee summons issued by a Justice of the Peace against a corporation, must be served on a general agent or principal officer of the company, and service on a local agent merely, will not give the Court jurisdiction.

Washtenaw Circuit, February, 1877.

The defendant in error commenced suit before a Justice of the Peace against A, in an action upon contract, and took out garnishee summons in due form against the plaintiff in error, who, it was claimed was a debtor of the said A, which was served on a local or station agent of the plaintiff in error at Manchester, and not otherwise; and after judgment against the principal defendant, the Justice rendered judgment in favor of the plaintiff in that suit, (the defendant in error,) against the plaintiff in error, for the full amount of such indebtedness, the defendant in error not appearing before the Justice except to object to the sufficiency of service.

The plaintiff in error brings the case into this Court by *certiorari*, and assigns for error amongst other things, that the Justice erred in rendering such judgment, as he acquired no jurisdiction over the plaintiff in error by service of process in the manner stated.

BENNE vs. BENNE.

Edwin F. Uhl, for plaintiff in error, referred to the Laws of 1861, page 242, Sec. 25.

G. R. Palmer, for defendant in error.

By the Court, HIGBY, J.—The statute referred to by counsel for plaintiff in error, provides that corporations, other than municipal, may be proceeded against as garnishees, and that “the summons against the garnishee in such case may be served on the President, Cashier, Secretary, Treasurer, General Agent, Superintendent, or other principal officer of such corporation.”

It appears the plaintiff in error, a railroad corporation, owned and was operating a railroad running from Ypsilanti, in the county of Washtenaw, to Hillsdale in the county of Hillsdale, in this State, passing through the village of Manchester, in Washtenaw County, having there a station for the reception and delivery of passengers, and that the person on whom the garnishee summons was served, was a local or station agent of said plaintiff in error at that point, having no authority except the care and oversight of its local business there.

Held, That the service was not such as to give the Justice jurisdiction—that process could only be served on one of the officers expressly named, or other principal officer of the corporation, and that a station agent whose authority was confined to the business of the company at a single station on the road, was not a principal officer within the meaning of said act.

Judgment reversed with costs.

MILLER F. BENNE vs. ALLEN BENNE

Motion for new trial. Citation of authorities, where the ground for the motion is newly discovered evidence.

Kalamazoo Circuit, May, 1871.

O. T. Tutthill, for the motion.

Severens & Burrows, Contra.

McWILLIAMS vs. DAVIS.

Motion for new trial, by defendant.

By the Court, BROWN, J.—The motion in this case is denied, the showing being deemed insufficient.

One of the grounds relied upon for a new trial was newly discovered evidence, and in support of this ground the following authorities were cited: *Hilliard on New Trials*, 362, 382, 384; 1 *Johns. Cases*, 402; 20 *Conn.*, 305; 14 *Vt.*, 414; 7 *Dana*, 329; 28 *Maine*, 379; 7 *Met.* 478; 6 *Pick.*, 114; 18 *Vt.*, 460; 20 *Conn.*, 305; 3 *Gra.*, and *Waterman on N. T.*, 1019.

Contra: It must be made to appear affirmatively that the evidence could not have been discovered by due, ordinary or reasonable diligence. *Hilliard on New Trials*, 378; *Robinson vs. Doe*, 6 *Blackf.*, 85; *Gardner vs. Gardner*, 2 *Gray*, 434; *People vs. Mack*, 2 *Parker*, 673; *Simpkins vs. Wilson*, 11 *Ind.*, 541; *Laflin vs. Herrington*, 17 *Ill.*, 399; *Williams vs. Baldwin*, 18 *John.*, 489; *Stearns vs. Allen*, 18 *Vt.*, 119.

Newly discovered evidence, merely cumulative, is no ground for a new trial. *Hilliard on N. T.*, 180, § 18; *Stimpson vs. Wilson*, 6 *Ind.*, 474; *Ferrin vs. Protection Ins. Co.*, 11 *Ohio*, 147; *Schlencker vs. Risley*, 3 *Scam.*, 483; *Smith vs. Schultz*, 1 *Scam.*, 499; *Jennings vs. Loring*, 5 *Ind.*, 250; *Gardner vs. Gardner*, 2 *Gray*, 434; *Manix vs. Mulony*, 7 *Clark*, 81; *Gardner vs. Mitchell*, 6 *Pick.*, 116; *Sawyer vs. Merrill*, 10 *Pick.*, 16; *Whitbeck vs. Whitbeck*, 9 *Cow.*, 266; *People vs. S. C. of N. Y.*, 5 *Wend.*, 114; 10 *Id.*, 85.

Newly discovered evidence, which goes only to impeach the credit or character of a witness, is not sufficient ground for a new trial. *Hilliard on N. T.*, 385; 6 *Blackf.*, 496; 11 *Barb.*, 215; 2 *Denio*, 109; 11 *Ind.*, 234; 5 *John.*, 248.

McWILLIAMS vs DAVIS.

Exceptions to referee's report.

By the Court, BLACKMAN, J.—The referee in his report has set out a summary of the evidence and the conclusion of law

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thereon. From this summary it appears that the plaintiff was indebted to defendant on note and mortgage, and while absent from Niles sent defendant some money by express. On his return he asked to have it indorsed on his note. This, defendant refused to do unless the express receipt was produced, which was mislaid. Plaintiff finally in small sums paid and took up his note. There were no indorsements on it. Some time after he found the receipt and presenting it to defendant demanded payment. Then defendant claimed the money was allowed in the payment of the note at the time the parties looked over their matters and defendant gave up the note.

The referee held:

1. The burden of proof was on the defendant to show that he applied the money as requested.

2, That as there was proof that no such indorsement was made, the defendant was then bound to show by a preponderance of proof that it was in fact allowed in settlement, and that it was not done.

To this finding as to the burden of proof defendant excepted.

Held, The first finding is erroneous, but immaterial to the actual issue, which is that the money was not applied in payment of the note, and that it was not indorsed. 9 Mich. 500.

The second finding is correct as the plaintiff had made out a *prima facie* case.

Where, upon the facts found by the referee, the plaintiff is entitled to recover, an erroneous finding of law which did not affect the decision on its merits will be disregarded.

The exceptions are disallowed.

EDSON W. COOK vs. MORELL POTTER.

In an action on the case, for negligence, the plaintiff cannot recover unless there was negligence on the part of the defendant, and freedom from contributory fault on the part of the plaintiff.

Negligence is a violation of the obligation which enjoins care and caution in what we do,—is the want of such care as men of ordinary prudence would use under similar circumstances.

Kalamazoo Circuit, May, 1871.

COOK vs. POTTER.

May & Buck, Attorneys for Plaintiff.

Severens & Burrows, Attorneys for Defendant.

Charge of the Court, by BROWN, J.—Gentlemen of the Jury:

The plaintiff in this action claims that on the evening of the 30th of October, 1869, at the village of Brady, in this county, he had his team—a span of horses—harnessed to a lumber wagon, hitched to a post or rail in the street, the rear end of the wagon extending out into the street, and that while the team were thus standing, the plaintiff rode his horse violently against the wagon, upsetting or partially upsetting the same, and thereby frightening the plaintiff's horses so that they broke away and ran off with the wagon, breaking it and the harness, to the plaintiff's injury and damage. The plaintiff also claims that by reason of the fright occasioned to his horses, they have been rendered less safe and reliable, and that ever since then they have been easily frightened and occasionally break away from their driver, and that by reason of their being thus easily frightened and prone to run, their value is greatly reduced.

It is not contended that there was anything willful on the part of the defendant.

The Court is requested by the attorneys for the defendant to charge you, "that in order to entitle the plaintiff to recover in an action of this character, where the plaintiff claims a right to recover on the ground of the defendant's negligence, two things must concur: negligence on the part of the defendant, and freedom from contributory fault on the part of the plaintiff." Such I recognize to be the law.

If you find from the evidence that the injury complained of was the result of an accident, not intentional, the defendant is not liable without proof of negligence amounting to want of ordinary care.

By ordinary care is meant such care as is generally used in the every day life and conduct of men.

If you find from the evidence that the defendant did not use ordinary care and diligence, still if you find that the plaintiff, in the manner in which he left his wagon projecting into the high-

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way, was guilty of negligence, and that such negligence contributed to the injury, then you must find for the defendant.—22 *Wis.*, 245; 2 *Mich.*, 265.

The greatest negligence on the part of the defendant will not cure the defect of the least negligence on the plaintiff's part.

"Unavoidable accident," is not such an accident as is physically impossible in the nature of things for the defendant to have prevented, but by unavoidable accident is only meant that it was not occasioned by the want of such care as the law holds every man bound to exercise. 8 *Wend.*, 472.

No one is responsible for an injury caused purely by unavoidable accident, while he is engaged in a lawful business, even though the injury was the direct consequence of his own act. *Shearman & Redfield on Negl.*, § 5; 2 *Camp.*, 500; 8 *Wend.*, 469; 18 *E. C. L.*, (2 *Chitty.*) 638; 1 *Bing.*, 215; 21 *Wend.* 618; 17 *Barb.*, 94.

A difficulty sometimes arises in determining what amounts to negligence. The defendant would be bound to exercise more care in riding through a town in the darkness and where teams were liable to be hitched, than he would be when riding in the open country by daylight and where teams were not likely to be met with. 4 *Dana*, 497.

The best definition of negligence that I have seen, is to be found in the opinion of the Court, in the case of the *Tonawanda R. Co. vs. Munger*, 5 *Den.*, 255, 267. "Negligence," says the learned Judge, "is a violation of the obligation which enjoins care and caution in what we do" And yet, this definition does not give us an idea of the extent and degree of the care and caution we are to use. It has been held, in numerous cases, that when the facts in a case of this character are undisputed, a question of law is raised, and that the Court should decide it. But if negligence is the want of such care as men of ordinary prudence would use under similar circumstances, it occurs to me that the jury with their experience and observation are quite as well, if not better qualified to judge as to what men of ordinary prudence would do under like circumstances, and I cannot resist the conviction that a jury of farmers who are in the

COOK vs. POTTER.

habit of using teams and of observing how others use their teams, are much better qualified than I am, to judge and pass upon the question thus presented.

Now, gentlemen, the damages sustained by the plaintiff in this cause were the result of a combination of circumstances. Take away either of the circumstances, and, so far as we know, the collision would not have occurred. It is important, then, for you to enquire as to each of the circumstances contributing to the injury, and see who is responsible for such circumstances, and whether the connection of the parties with those circumstances were such as to make them guilty of a fault—and by a fault we mean a dereliction from duty, a deviation from propriety.

It is your duty to consider each of the circumstances directly contributing to the injury complained of, and if you find the defendant in fault and the plaintiff not in fault, in any respect, then your verdict should be for the plaintiff, for the damages directly and naturally resulting from such acts of the defendant as you find were careless and negligent, such as the breaking of the wagon and harness, and if you find that by reason of the wrongful act of the defendant, the plaintiff's team has become and has continued to be liable, apt and accustomed to run away, and in a measure unmanageable, then you should award to the plaintiff as damages on that account whatever the team has been lessened in value by reason of such wrongful act of the defendant.

But, if you should find from the testimony, that the plaintiff was guilty of a fault in bringing about any of the circumstances without which the injury would not have been occasioned, he cannot recover. In short, the plaintiff is entitled to recover, if he has shown by a preponderance of evidence that the defendant was negligent and that he, himself, was free from contributory fault. Otherwise he is not.

Verdict for plaintiff.

CAMERON vs. REED.

ALEXANDER CAMERON vs. DE WITT C. REED.

C and R owned adjoining farms. By agreement between them, C was to keep up the east part, and R the west part of the division fence. Neither party complied with the agreement. R's cattle broke over the west part of the fence, upon C's lands. *Held*, That R was liable to C for damages.

Kalamazoo Circuit, May, 1871.

This is an action of trespass, and was submitted to the Court on the following stipulation of facts:

It is hereby stipulated and agreed between the above named parties, by their respective attorneys, that the following is a correct statement of the facts in said cause, and that said cause be submitted to said Court upon such statement, and the argument of counsel upon the law, at the present term of said Court.

STATEMENT OF FACTS.

The above parties have owned and occupied adjoining lands in the Township of Kalamazoo, in said county, for about four years last past, said lands being enclosed with fences and cultivated by the respective parties. On or about the 15th day of March, 1868, the parties entered into an agreement in writing, by which they agreed upon a division of the line or partition fence between their respective fences so occupied and cultivated, and the part of such fence that each should thereafter support and maintain, the plaintiff, by said agreement, to support the east part, and the defendant the west part of said division fence from the point agreed upon, and that no part of said partition fence was kept by the parties or either of them, after said division, of the height and description required by law.

That at divers times between the first day of May, 1868, and the commencement of this suit, the cattle of the said defendant broke through and over that part of said partition fence assigned to said defendant, by said agreement to be kept in repair, on to the lands of the said plaintiff, and destroyed the grass and grain then and there growing and belonging to said plaintiff, to the amount and value of fourteen dollars and fifty cents.

CAMERON vs. REED.

G. P. Doan, Attorney for Plaintiff.

Hawes & Edson, Attorneys for Defendant.

By the Court, BROWN, J.—Act 179, of the *Session Laws* of 1861, provides that "No person shall be entitled to recover any sum of money in any action at law for damages done upon lands by any beast or beasts, unless the partition fences, by which such lands are wholly or in part enclosed, and belonging to such person, or by him to be kept in repair, shall be of the same height and description as is required by the provisions of *Com. L.*, § 605;" i. e., four feet and a half high, and in good repair or something equivalent thereto.

How should this statute be construed?

At common law the owners of beasts are liable for any damages done by them upon the lands of others; and it is only by statute, prescription or agreement that a defense can be set up.

The language of the statute, above quoted, is very broad, and it is contended that the neglect of the plaintiff to keep up his share of the division fence is a defence to this action—that having failed to comply with the requirements of the law, he is not in a position to ask the aid of the Court in his behalf.

In the case of *Aylesworth vs. Harrington et. al.*, 17 Mich., at page 422, Judge Cooley, in delivering the opinion of the Court, says, in reference to this statute, "The purpose of its provisions was to compel every person to discharge his duty in regard to partition fences, at the peril of such losses as he might suffer from the depredations committed in consequence of such neglect, by the beasts of those persons to whom the duty was owing." And at page 424, of the same case, the learned Judge says:—"It is very evident under these statutory provisions that the duty of any person to keep up a partition fence, is one created by the statute in favor and for the protection of the adjoining proprietor."

In this case, Cameron, the plaintiff, was under obligation to keep up his share of the division fence, for the protection of the defendant, Reed, the adjoining proprietor; and Reed was bound to keep up his share of the fence, for Cameron's protec-

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tion. Both parties neglected their duty. But it cannot be said that the negligence of one naturally contributed to the negligence of the other. Each must be held responsible for his own negligence. The depredations were not committed in consequence of the plaintiff's neglect, but in consequence of the defendant's neglect. The law imposed no duty upon Cameron to keep up the portion of the fence which the defendant had agreed to keep in repair, and over and through which the cattle passed to Cameron's land.

Let judgment be entered for the plaintiff for the amount stipulated as damages, to wit, \$14 50, with costs to be taxed.

IRA D. BIXBY AND LORENZO BIXBY *vs.* NICHOLAS B. ROWE,
GEORGE W. WALLACE AND NATHAN H. BITELY.

A defective certificate of sale of real estate, upon execution, may be amended by the person making the sale, even after his term of office has expired.

Van Buren Circuit, April, 1871.

This was an action in assumpsit on promissory note made by defendants.

Suit commenced by declaration. Personal service on all the defendants. *Narr.* filed December 24, 1867. No appearance by either defendants.

January term, 1868, default of defendants entered and made absolute, and on the 22d of January, 1868, judgment rendered for plaintiffs for amount of note, interest and costs.

Afterwards the costs were taxed and execution issued to the Sheriff of Van Buren Co., (Edwin R. Farmer,) and on the 23d day of June, 1868, was levied on lots 7 and 8, block 3, Union Addition to the village of Lawton, Van Buren Co.

Sale made, August 8, 1868, at 1 o'clock P. M., at the Court House in Paw Paw, and lots bid off by plaintiffs, for amount of judgment, interest and costs of sale.

Plaintiffs waited the expiration of the fifteen month's redemption

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right, and then, on examination and on taking counsel, found that the Sheriff's certificate of sale was defective, omitting to state the name of the person to whom the premises were sold, and also the amount for which they were sold.

A motion is now made by the plaintiffs in behalf of the Sheriff, for an order of the Court, granting to Edwin R. Farmer, late Sheriff, leave to amend his certificate of the sale of said real estate, according to the facts of said sale.

Motion *Ex parte*.

By the Court, BROWN, J.—Can a Sheriff amend his certificate of sale of real estate; and if he can, will the Court permit him to do so, after his term of office has expired and he is no longer holding that office?

J. W. Brees, for the motion, contends that it is settled that a Sheriff may amend his certificate of sale of real estate by leave of the Court. 1 *Doug. Mich. R.*, 42. This was an attachment suit and judgment by default, and the defendants moved to set aside the judgment and all subsequent proceedings, for irregularities, and the Court refused the motion, assigning as one ground therefor that the Sheriff had a right to amend his return in the Circuit Court. 2 *C. Laws*, page 1201, § 4418.

It has been held that a Sheriff may amend his certificate of sale where he has omitted to describe the parcel sold. 1 *Cowen*, 430.

He may also strike out a parcel which should not have been sold. 8 *Howard's Pr.*, 79. A case in 1 *Cowen*, 218, gives a form of order of amendment and is very similar to the present case, showing that the late Sheriff may make an amendment by leave of the Court.

The recitals in a Sheriff's deed are amendable. 13 *Wend.*, 29, and so of variance between the judgment and execution. 4 *Wend.*, 462.

There seems to be abundant authority to the effect that a Sheriff who made the sale or his successor in office may make a deed. 2 *C. Laws*, page 937, § 3151; 3 *Mich.*, 436; 3 *Cowen*, 75.

As to when a Sheriff may complete execution process in his hands, see 1 *C. L.*, page 210, § 431; page 207, § 418.

As to re-sale on execution by Sheriff, after he had gone out of office, see 5 *Hill*, 228; 4 *Barb.*, 180.

SUGGESTIONS TO LAWYERS.

This motion is made on the part of the plaintiffs in execution, and the question of *laches* does not arise.

The motion is granted.

SUGGESTIONS TO LAWYERS.

By C. R. BROWN.

Read no authority from reports, without first having examined the case so as to be able to state the main facts.

Read only so much as bears directly upon the point. If the Judge comprehends readily, nothing more is required. If he does not, all that you read, not bearing directly upon the point, only tends to confuse rather than enlighten.

Never read an authority to support your position when the Court concurs with you. It is proper to ask, whenever a question arises, if the Court entertains doubts, and upon what particular points; and while the Judge, in doubtful cases, should not decide without a full hearing, it is considered to be no compromise of that dignity which pertains to the Bench, for the Judge to intimate to counsel the points upon which he desires argument and authorities. If the Court intimates a desire not to hear you, you may take it for granted your opponent will give the Court the benefit of his researches, if he disagrees with you, and you will then have an opportunity to be heard, if the first impressions of the Judge have been modified or changed.

Don't except to rulings which you know are purely discretionary. It is difficult for the Judge, in such case, to determine what motive dictates the exception—whether it is from force of habit, ignorance of the law, or to annoy the Court and lumber up the record.

One exception upon the same point, and involving the same principle is just as effectual as a dozen. Hence, when a ruling has been made upon a question deemed to be vital, it is difficult to conceive what is to be gained by interposing objection after objection upon the same point.

SUGGESTIONS TO LAWYERS.

Never ask the same question more than twice to the same witness. If he tries to evade your question, the jury and Court can hardly fail to discover it, and will weigh the testimony according to its merits. By pressing even an unwilling witness to an unreasonable extent, jurors are very apt to get the idea that you are trying to persecute, or that you are hard pressed to make out your case.

The cross-examination of an honest witness should be conducted with candor, and the questions put should be *directly to the point in issue*. A different course of examination is almost sure to prejudice a jury against the attorney, and too often, it is feared, against his innocent client.

In the cross-examination of a witness whom you believe to be dishonest, it is well to measure his mental calibre before opening your broadside upon him. Too many attorneys take it for granted that they are so much sharper than the witness that they will have no difficulty in exposing his falsehood; when, in fact, it often happens that the questions put, only serve to point out to the witness any inconsistencies that may have appeared in his testimony in chief, and thus enable him, so to speak, to cover his tracks with fresh falsehoods.

It is unfortunate for the client when his counsel, forgetting his duty as an officer of the Court, seeks a petty quarrel with a witness, and when he conceives he has said a sharp thing, or has cornered the witness, to appeal to the jury with a broad triumphant grin, indicative of a degree of self-satisfaction, seeming to say, "I've got him now. Didn't I do that nice?" In nine cases out of ten, of this character, the jury, if allowed to answer, would say, "Yes, you have bullied an honest witness into a falsehood. It is unfortunate for the cause of truth, that you have not less cheek and more brains."

Some lawyers, if permitted, indulge in cross-bar controversies, and seem to relish it. It is hardly necessary to remark that such a habit should be avoided.

The habit of making constant objections to the introduction of evidence, without being able to assign any reason for such objections, indicates a desire to suppress the truth, and a jury are not slow in discovering that fact.

LADD vs. THE M. E. CHURCH OF EAST SAGINAW.

In almost every cause there are many facts important to the issue known to both parties. In such cases it is believed that honest attorneys will not hesitate to admit such facts at the commencement of the trial, and thus save much valuable time and expense.

The rules of practice, and the rules of evidence, are designed to develop the truth as to matters in controversy between the parties, and when these rules are urged and their operation invoked to suppress the truth and strangle justice, it is like stealing "the livery of Heaven to serve the devil in."

EDWARD W. LADD vs. THE METHODIST EPISCOPAL CHURCH OF EAST SAGINAW.

It is no ground for the transfer of a cause, under section 3445 of the *Compiled Laws*, that the Judge of the Circuit Court has been consulted or employed as counsel in the cause, unless such consultation or employment took place before the statute took effect.

Saginaw Circuit, June, 1871.

This was a motion to set aside an order of the Circuit Court Commissioner of Saginaw County, transferring the above entitled cause from the Saginaw to the Wayne Circuit. The petition for that purpose was made by the plaintiff to the Commissioner, and as a cause of transfer set forth, "that Hon. John Moore, the Circuit Judge of said county, has been consulted and employed as counsel in the subject matter to be litigated in said cause, and has since assisted in the trial of said cause." The application for the transfer was claimed to be based upon section 3445 of the *Compiled Laws*.

I. M. & H. P. Smith, for Plaintiff.

H. Joslin, for Defendant.

By the Court, GRIER, J.—The statute upon which the order of the Commissioner was founded, is as follows: "Whenever any civil suit or proceeding shall be pending in any Circuit Court in this State, either on the law or equity side of said Court, in which the Judge of said Court *shall be* interested as a party, or as a member

LAKE vs. THE M. E. CHURCH OF EAST SAGINAW.

of any corporation which is a party to said suit, or has heretofore been consulted or employed in the subject matter to be litigated in said suit, or in which he would be excluded from sitting as a juror, by reason of consanguinity or affinity to any party to said suit, the same may be transferred to some other Circuit Court, in the manner provided by this act."

By the language of the act referred to the fact that the Judge of the Circuit has been consulted or employed as counsel, is not a cause for transfer, unless such consultation or employment had taken place before the act took effect. The words used are, "*has heretofore been consulted or employed,*" &c., while as to the other causes of transfer named, the term "*shall be,*" is used, making a clear grammatical distinction between the different causes of transfer. It is not denied by plaintiff's counsel that this construction must prevail if the words are construed according to their exact grammatical sense; but it is claimed that no reason exists for such a distinction, and that the same necessity exists for a transfer in one case as in the other.

It is a sufficient answer to this position to refer to a few well settled rules of statutory construction:

"It is a rule of universal application that effect must be given to the *words used* by the Legislature, if there be no uncertainty or ambiguity in their meaning." 4 *McLean*, 463.

"Where a law is plain and unambiguous, whether expressed in general or more limited terms, there is no room left for construction, and a resort to extrinsic circumstances is not permitted for the purpose of ascertaining the meaning, and in such cases the legislative will must be obeyed." 9 *Pet.*, 266; 2 *Cranch*, 358.

"Where legislative expressions are obscure, courts may give a reasonable interpretation to them, but they have no right to distort those which are clear and intelligible." 13 *Mass.*, 324.

The construction should be such "that if possible, no sentence, clause or word, shall be treated as superfluous, void or insignificant." 22 *Pick.*, 571; 2 *Mich.*, 138.

Now, to attain the result contended for by plaintiff, it would be necessary to strike out the words, *has heretofore been,* and insert in lieu thereof the words, "*shall have been,*" or "*shall be,*" a form which it is competent for the Legislature only to exercise. For the

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Court to do so would be a clear arrogation of legislative power entirely contrary to the theory of our system of government, and inconsistent with the genius of our republican institutions. The legislative will having been expressed it must be obeyed. It is not for the Court to criticize the reasons of the Legislature, but to ascertain its will, and to give that will effect.

The motion to vacate the order of the Commissioner must be granted.

WILLIAM GILBERT vs. DELOS SHOWERMAN et. al.

Whenever a locality loses its character as a place suitable for a place of residence and becomes essentially a manufacturing neighborhood, where the business generally carried on is hostile to and inconsistent with its use as a place of residence, a court of equity will not interfere to prevent the carrying on of the business of manufacturing, even though the trembling motion and noise thereby occasioned, renders it almost impossible to use adjoining premises as a dwelling.

Wayne Circuit, July, 1871.

Ward & Palmer, for Complainant.

Moore & Griffin, for Defendants.

By the Court, PATCHIN, J.—This is a bill for an injunction to close a grist mill situated on Jefferson avenue, in what is known as the Union Block, in the city of Detroit.

The mill was put in an ordinary building, used for the purpose of a store, but with buildings on each side, and upon a foundation separate and distinct from the walls of the buildings.

It is conceded that the complainant has resided over the store next to the mill a number of years before defendants put in the machinery, and while it was being put in, and that he did not make any objection to it, and has not since that time until the bill in this case was filed.

It is claimed on the part of the complainant that the trembling motion and noise caused by running the mill is so great as to be a nuisance and that it is impossible to use his own premises for the purposes of a dwelling, as he has before the mill was placed there.

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It is claimed on the part of the defendants that the block is not suitable for dwellings, and that the business of milling as conducted by them is in keeping with the business carried on in the remainder of the block.

The question involved in the case at bar is, whether a given locality, having once been used for a certain purpose, can afterwards, and while it is being used by those occupying it in the first instance, be so used by a new comer as to effectually drive out the first occupant, or, in other words, if a locality be first used for purposes of dwellings, must it ever afterwards be occupied for the same purposes, or, *vice versa*, if for purposes of manufacturing, must that particular locality be exclusively used for that purpose?

Except as establishing general principles in regard to the subject, the books can be of but little use.

So much depends upon the circumstances of each case that it is impossible to lay down any general rule that will apply to all.—That no man can foresee what particular localities in a large city will be used for purposes of residence or otherwise, perhaps will be conceded by all. Any one acquainted with the early history of our own city will concede that business does not remain in particular localities, but is constantly advancing as the city enlarges.

It is quite clear that business suitable to be conducted only in the outskirts of a city, such as cattle yards, etc., must give place to others whenever the particular locality can no longer be called outskirts, but has become a thickly populated portion of the city proper, where it would be conceded in the first instance to be improper to establish such a class of business. The same rule certainly ought to apply to residences. Whenever a locality loses its character as a place suitable for them and becomes essentially a manufacturing neighborhood, where the business generally carried on is hostile to and inconsistent with its use as a place of residence, the one must give place to the other.

It follows, therefore, that in the case at bar, residences having generally been superseded by business, the locality can no longer be considered as adapted to any other purposes than business, and the few domiciles that chance to remain must from the necessities of the case change their locality.

The motion for an injunction must be denied and the bill dismissed with costs.

BRIGGS vs. KAUFMAN, et al.

**EMORY O. BRIGGS vs. JOHN H. KAUFMAN, WILLIAMSON MASON,
ISAAC W. WILLARD, AUGUSTUS E. HARDEE, WARREN G. KINNEY,
WILSON LEE, ALBERT R. WILDEY AND PETER GREMPA.**

Where a defendant has any relief to pray, beyond what the scope of the complainant's bill will furnish him, he must file a cross bill.

To entitle a defendant to a decree against his co-defendant, a cross bill is necessary.

Where premises have been mortgaged, and subsequently parcels of or undivided interests in the same lands have been conveyed or incumbered, on a foreclosure of such mortgage the premises must be sold in the inverse order of such conveyance or incumbrances.

Van Buren Circuit, April, 1871.

This action was brought to foreclose a mortgage. The facts as shown by the evidence are as follows: On the 10th day of October, 1865, Isaac W. Willard and Peter Grempe, two of the defendants, were the owners and tenants in common of the premises described in the mortgage which the complainant seeks to foreclose. On that day, Kaufman, who held a contract for the sale and purchase of the land, took a deed therefor, paying Willard the sum of about \$735, and executing a mortgage to Grempe to secure his share of the purchase money. On the 11th of October, 1865, at 10 o'clock A. M., this mortgage was recorded. The defendant, Mason, advanced the money paid to Willard, and on the 11th of October, 1865, took a deed from Kaufman of an undivided one half of the premises, which deed was recorded on the same day, at 12 o'clock M.

For the undivided one-half interest in the premises sold by Kaufman to Mason, Mason was to pay something more than the amount paid to Willard, but how much more does not appear. Whatever the balance was, Mason secured by mortgage to Kaufman, which, Mason swears, has been paid and discharged. When Grempe recorded his mortgage he knew nothing of the conveyance to Mason, but swears that he only expected to get a mortgage on one-half of the land.

Some time after the execution of the deed from Kaufman to Mason, Kaufman conveyed an undivided one-fourth interest to the defendant, Hardee, who mortgaged the same to the defen-

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ant, Lee. Afterwards, and in 1868, Kaufman conveyed all the interest he had retained (an undivided one-fourth) to the defendant Warren G. Kinney. Gremps assigned his mortgage to Briggs after the maturity of the note which it was given to secure, and this suit is brought to foreclose that mortgage.

About three months after the execution of the mortgage from Kaufman to Gremps, Mason discovered for the first time that the mortgage was upon all the land, instead of an undivided one-half.

The defendant Mason, in his answer, prays that the mortgage shall be declared a lien on the undivided half of the land in which he has no interest; while Lee insists that it should be declared, according to its terms, a lien upon the whole of the land.

Lee's solicitor contends that at the time he took a mortgage upon the land, the record showing the Kaufman mortgage to be a lien upon the whole premises, it would now be inequitable to declare it a lien upon the half only, upon which he has since taken a mortgage—that such a decree would destroy or lessen his security.

Stephenson & Barnum, Solicitors for Complainant.

Balch, Smiley & Balch, Solicitors for defendant Mason.

Upton & Tucker, Solicitors for Hardee and Lee.

By the Court, BROWN, J.—I think it is quite clear from the testimony, that as between Mason and Gremps, or between Mason and Briggs, who took the assignment of the mortgage, if the pleadings would warrant it, Equity would require that the mortgage be declared a lien upon the undivided half of the premises retained by Kaufman when he deeded to Mason. There is nothing in the testimony of Kinney, Mason or Gemp, showing what, if any knowledge, Hardee or Lee had as to the equities between Mason and Gremps.

On the 20th of April, 1871, a stipulation closing proofs was filed, signed by Stephenson & Barnum, for the complainant, Upton & Tucker, for the defendant Lee, and Balch, Smiley &

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Balch, for the defendant Mason. Subsequently the solicitors for the complainant consented to permit the defendant Lee, to put in further testimony, which was accordingly taken. Mason was not a party to this latter stipulation, and hence could not be affected by this testimony.

Lee insists that the maxim "*Leges vigilantibus non dormientibus subveniunt*," should be applied to the defendant Mason, and himself—that Mason having slept upon his rights is estopped from asking relief from the mortgage as it appears of record, since such relief would prejudice his (Lee's) rights under the Hardee mortgage.

The relief asked for by the defendant Mason, involves the necessity of a litigation between him and his co-defendants. Under our system of equity practice, not requiring defendants to serve upon their co-defendants notices of their pleadings and proceedings, it is difficult to perceive how a decree can properly be made in favor of one defendant against his co-defendant.

The defendant Mason, asks substantially, that the Kaufman mortgage be corrected to correspond with the original intent of the parties. Now it is a well settled rule that "a defendant cannot pray anything, in his answer, except to be dismissed the Court," and "if he has any relief to pray, or discovery to seek, he must do so by a bill of his own, which is called a cross bill. 2 Barb. Ch. Pr, 126; Lube's Eq. Pl., 39.

"A cross bill is used to settle conflicting claims between co-defendants, which it is found necessary to adjust before a complete decree can be made upon the subject matter of the original suit and the rights of the parties therein." 2 Barb. Ch. Pr., 127; Mitf. Eq. Pl., 81; and "a cross bill is necessary to enable a defendant to have a decree against a co-defendant." Talbot vs. McGee, 4 Monroe 379.

In the case of *Pattison et. al. vs. Hull et. al.*, 9 Cowen, 747, it was held that a cross bill is always necessary where the defendant is entitled to some positive relief beyond what the scope of the complainant's bill will afford him.

Under the state of the pleadings in this case no decree can be made discharging the lands of Mason from the lien of the Kaufman mortgage. The case must be disposed of by the well settled rule in

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reference to the marshalling of assets and securities. It must be referred to a commissioner to report the amount due on the mortgage, and on the coming in of that report a decree must be entered for the payment of the sum found due, and in default of such payment that the premises be sold in the inverse order of alienation.

The answer of Mason prays his premises be decreed discharged from the lien of the Kaufman mortgage. This cannot be done. It also prays that the lands be sold in the inverse order of alienation and incumbrance. Such a prayer is not for affirmative relief, nor does it seek to abridge the complainant's rights. The order in which the premises are sold cannot affect him.

In the case of *Cooper vs. Byzley*, 13 Mich., at page 474, Campbell, J., in delivering the opinion of the Court, says: "It has always been understood to be the settled law of this State that, where mortgaged premises are conveyed or incumbered in parcels they are upon a foreclosure, to be sold in the inverse order of such conveyances or incumbrances, unless the mortgagee will be prejudiced by having the property sold in parcels." The reason assigned in the books for this rule is, that where one is owing a debt, his own property should be held to discharge that debt, before taking the property of his grantee. And this equity having arisen in favor of the first purchaser, must remain in his favor against any subsequent equities of other parties derived from his grantor. The reason of the rule applies with equal force where undivided interests are conveyed or incumbered as when separate parcels are conveyed or incumbered. For authorities on the question of marshalling securities, see *Mason vs. Payne*, *Walker's Ch. R.*, 459; *Caruthers vs. Hall*, 10 Mich., 40; *James vs. Brown*, 11 Id., 25; *Cooper vs. Byzley et. al.*, 13 Id., 463; 1 *Story's Eq. Jur.*, § 683; *Howard Ins. Co. vs. Hulsey*, 4 Sandf., 566; 8 N. Y., 271; *Chapman vs. West*, 17 Id., 125; *La Forge Ins. Co., vs. Bell*, 22 Barb., 271; *Commercial Bank vs. Reserve Bank*, 11 Ohio, 444; *Guion vs. Knapp*, 6 Paige, 35; *Grosvenor vs. Lynch*, 2 Id., 300; *Stuyvesant vs. Hale*, 2 Barb. Ch. R., 151; *Ayers vs. Husted*, 15 Conn., 504; *Hasting's Case*, 10 Watts, 303; *Shannon vs. Marsellis*, 1 N. J. Ch., 413; *Wickoff vs. Davis*, 3 Green. Ch., 224.

Let it be referred to a commissioner to compute the amount due, and on the coming in of his report, take a decree directing a sale of

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the mortgaged premises, in default of payment, in the order I have indicated, governed by the abstract of title submitted in evidence, and selling so much of the premises as shall be necessary to satisfy the mortgage with costs of foreclosure and sale.

JEAN O'HARA vs. MICHAEL McENNY.

1. A writ of attachment issued from a Justice's Court must be served by seizing the goods of the debtor and by leaving a copy of the writ and inventory with the defendant, if he can be found in the county; if not so found, such copies must be left at his last place of residence if there be any such place in the county, and if not, then by leaving the same with any person in whose possession the goods may be found; and unless the copies are served in one or the other of the modes indicated, the Court acquires no jurisdiction over the defendant.
2. Where in an attachment proceeding the goods were seized, but no such service was made as to give the Court jurisdiction over the person of the defendant, and on the return of the writ the Justice continued the cause to a future day, and the defendant appeared before the Justice prior to the adjourned day and demanded trial, *Held*, that such appearance was a waiver of service of process, and that the defendant thereby subjected his person to the jurisdiction of the Justice.

Washtenaw Circuit, March, 1871.

This case comes up from Justice's Court on *certiorari*.

The defendant in error sued out a writ of attachment against the goods and chattels of the plaintiff in error. The Constable who executed the writ made the following return :

"By virtue of the within attachment, I, Orin A. Wait, on the 27th day of June, 1870, seized the goods and chattels of the defendant, mentioned in the inventory, of which the annexed is a copy; and I further return that no one could be found in whose possession the said goods and chattels were, and that no person could be found at the last place of residence of the within named defendant with whom to leave a copy of the writ and inventory hereto annexed.

Dated July 8th, 1870.

O. A. WAIT,
Deputy Sheriff."

The writ was returnable July 8th, 1870, at one o'clock P. M., at which time the plaintiff, by his attorney, appeared and filed his declaration, and thereupon, the defendant not appearing, the Justice entered an order adjourning the cause until the 12th of August,

O'HARA vs. McEWY.

1870, at one o'clock P. M. July 26, 1871, the defendant, by A. E. Hewett, entered his appearance and requested a trial, pursuant to § 3685, *C. L.*, which provides that, "If the attachment shall not be personally served upon any of the defendants, and none of the defendants shall appear on the return day thereof, the Justice shall continue the cause for not less than thirty, and not exceeding ninety days; and in such case; no hearing shall be had or judgment rendered thereon, until the expiration of that time, unless the defendant shall sooner appear and request a trial; in which case the Justice shall appoint a day for the trial of such suit, and cause notice thereof to be given to the plaintiff."

The appearance of the defendant was in writing, addressed to the Justice, notifying him of his, Hewett's retainer, and demanding an immediate trial. No question is raised as to Hewett's authority to appear for the defendant. On filing the defendant's notice and demand for trial, the Justice notified the parties that the cause would be tried July 28th, 1870, at one o'clock P. M. July 28th, the case was called, and the plaintiff appeared by his attorney, G. R. Palmer, and the defendant by his attorney, A. E. Hewett, who moved to have the cause dismissed, assigning as grounds for his motion, the following:

"1. The officer's return on the original writ does not show that the writ was ever served on the defendant, either personally or otherwise, as per sections 27 and 28, of chapter 117, of the *Compiled Laws of Michigan*.

"2. That the writ of attachment was never served on the defendant personally, nor was it left at the last place of residence of the defendant, nor was it left with the person in whose possession the goods were found, but that the copy of said writ was delivered over to the Justice by the officer whose duty it was to serve said writ."

The motion was overruled, and on motion of the plaintiff's attorney the cause was adjourned until the 12th of August next following. August 12th the plaintiff appeared, and defendant not appearing, plaintiff proceeded to prove his claim, and took judgment for \$60 and costs.

O'HARA vs. McENNY.

The refusal of the Justice to dismiss the cause for want of jurisdiction is assigned as error.

A. E. Hewett, for Plaintiff in Error.

G. R. Palmer, for Defendant in Error.

By the Court, BROWN, J.—The statute requires the officer serving the attachment to serve a copy of the writ and inventory upon the defendant if he can be found in the county; if not so found, to leave such copies at the last place of residence of the defendant, if there be any such place in the county, and if not, then by leaving the same with any person in whose possession the goods may be found. *C. L.*, § § 3679, 3680.

If the defendant could be found in the county it was the duty of the officer to make personal service; if he could not be so found that fact should appear in the return. The return shows, by implication at least, that there was such a place as defendant's last place of residence within the county. If then personal service could not be had by reason of the defendant's absence, it was the duty of the officer to have left certified copies of the writ and inventory at such last place of residence; and the fact that he could find no person there with whom to leave his papers is no excuse for a non-compliance with the requirements of the statute.

It is clear that the service of these certified copies, in one or the other of the modes required by law, is requisite to constitute a complete and perfect service of the attachment. 2 *Wail's Law & Prac.*, (2d Ed.,) 174. And as there was no personal or substituted service, no jurisdiction was acquired over the person of the defendant by virtue of any act of the officer who attempted to serve the process.

The defendant, by his authorized attorney, caused his appearance to be entered, pursuant to the provisions of § 3685, *C. L.*, and demanded a trial. The plaintiff had already filed his declaration. If the appearance of the defendant was a general appearance he thereby subjected his person to the jurisdiction of the Court. It is well settled that all appearances are to

GRIMES vs. HOWARD.

be taken as general, unless at the time of entering such appearance, the party expressly specifies his appearance to be for some special purpose other than for contesting the cause on its merits. Here the defendant appeared and demanded a trial, thereby presenting an issue on the merits. Whether such appearance conferred jurisdiction over the property of the defendant is quite another question, and one I am not now asked to decide. See *Watt vs. Willett*, 2 *Hill*, 212; and see *contra*, 15 *Ohio*, 435.

The Justice was not called upon to order the discharge of the property, but to dismiss the cause. The defendant having subjected his person to the jurisdiction of the Justice, his motion came too late.

The judgment of the Court below must be affirmed with costs.

CECIL D. GRIMES vs. EBENEZER D. HOWARD.

1. Where a person contracts to do certain work and furnish materials, and abandons his contract without fault of the other party, he will not be permitted, in a suit on a *quantum meruit* for his services and materials to recover a sum exceeding the contract price. In such case the damages to which he is entitled, is the value of the work done and materials furnished, not exceeding the contract price, less the cost of completing the work and any damages the defendant may have sustained by reason of such failure.
2. Where such contract is abandoned through the fault of the employer, the employee may recover the value of his services and materials; and in determining the value of such materials and labor the contract of the parties may be considered, though such contract is not, necessarily, conclusive.

Kalamazoo Circuit, May, 1871.

Appleton & Bills entered into a contract with the defendant to do certain work upon and to furnish certain materials for a dwelling house to be erected for the defendant at a stipulated price. Before completing the work Appleton & Bills quit the job, claiming that the defendant failed to comply with his part of the contract; also claiming that the contract was mutually rescinded, and thereupon assigned their claim for their work and labor, and materials they had furnished, to the plaintiff, Grimes.

The defendant claimed that he had paid a just and fair sum for

THE PEOPLE vs. O'HARE, et. al.

THE PEOPLE vs. WILLIAM O'HARE, JOSEPH FORNEY AND LEWIS
WATERBURY.

After the trial has actually commenced, the Court has no power to order that the names of additional witnesses, known before the trial, may be endorsed upon the information.

Bay Circuit, May, 1871.

C. H. Denison, Prosecuting Attorney, for People.

A. McDonell, *A. C. Maxwell* and *Isaac Marston*, for Defendants.

By the Court, GRIER, J.—After the trial of defendants on a charge of grand larceny had commenced and after several witnesses on behalf of the prosecution, whose names had been properly endorsed on the information, had been sworn, the Prosecuting Attorney asked leave to endorse upon the information the names of additional witnesses. It appeared that the witnesses were known to the Prosecuting Attorney before the trial, but through inadvertence were omitted. The application is opposed by the attorneys for defendants.

The statute upon the subject provides as follows: "All informations shall be filed during term, in the court having jurisdiction of the offence specified therein by the Prosecuting Attorney of the proper county as informant; he shall subscribe his name thereto, and *endorse thereon the names of the witnesses known to him* at the time of filing the same; and at such time before the trial of any case as the Court may, by rule or otherwise, prescribe, he shall also endorse thereon the names of such other witnesses as shall then be known to him."

By this statute it is clearly intended that the names of witnesses known to the Prosecuting Attorney before the filing of the information, must be endorsed thereon before such filing; and that at any time *before the trial*, he shall endorse the names of such witnesses as shall have become known to him after the filing of the information. But the statute is silent as to what shall be done in case any witnesses shall be discovered after the commencement of the trial.—

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But the case at bar is clearly within the provisions of the statute. It was meant for the protection of the accused, and was therefore mandatory. To hold that it is within the discretion of the Court to allow the names of witnesses known before the trial, to be endorsed after the commencement of the trial, would be to declare that the statute is merely directory. Such a doctrine would be dangerous, and would tend to overthrow the safeguards thrown around the accused by the policy of our laws. In this case the names of the witnesses were known to the Prosecuting Attorney before the trial, and it was the intent of the statute to compel him to make that knowledge known to defendant, in the manner designated, before the trial, and thus prepare him for trial. Of course the statute does not apply to the case of rebutting witnesses.

The application must be denied, the Court having no discretionary power in the case.

THALES L. BUCK vs. MADISON MILLER.

Under Sec. 5597 of the *Compiled Laws*, as amended by the act of 1871, (*Laws of 1871*, page 192,) the plaintiff, in an action upon contract for the recovery of damages, is not entitled to costs unless the damages recovered by him exceed \$100—but the defendant is in such case, under Sec. 5600, *C. L.*, entitled to costs against the plaintiff.

Washtenaw Circuit. May, 1871.

This was an action upon contract commenced in this Court for the recovery of damages—the plaintiff's claim exceeding \$300. On the trial the plaintiff recovered \$80 77 damages. The plaintiff moves for final judgment for that amount and his costs of suit, basing his claim for costs on the 4th subdivision of Sec. 5597, of the *Compiled Laws*, as amended by the act approved April 17, 1871, (*Laws of 1871*, pages 192, 193.)

The defendant also moves for judgment for costs, on the ground that the damages recovered by the plaintiff are less than \$100.

C. Joslin, for Plaintiff.

H. J. Beakes, for Defendant.

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By the Court, HIGBY, J.—By the section referred to, as amended, it is enacted in substance, that if the plaintiff recover judgment he shall recover his costs: “*Fourth*, in all actions of replevin, and in all actions for the recovery of any debt or damages, or for the recovery of penalties or forfeitures, in all cases where the Court has exclusive or concurrent jurisdiction.”

It is claimed in behalf of the plaintiff, that as the Court had jurisdiction of this cause, and as it was for the recovery of damages, and the plaintiff recovered a judgment, he is entitled to costs.

The jurisdiction of the Court is not disputed. It is well settled in this State, that in an action of this nature, the test of jurisdiction is the amount claimed by the plaintiff in his writ or declaration, and not the amount recovered on the trial. *Strong vs. Daniels*, 3 Mich., 466; *Inkster vs. Carver*, 16 Id., 484; *Merrill vs. Butler*, 18 Id., 294.

If then we consider the words, “exclusive or concurrent jurisdiction,” as used in this (4th) subdivision, as referring to the action itself and the authority of the Court to try it and render judgment in it, the plaintiff’s claim must inevitably prevail.

But is that the sense in which those words were there used?—Does this construction lead to the result which was manifestly intended by the Legislature? If so, and it was intended that the plaintiff should recover costs in all actions for the recovery of damages in which he may recover judgment, without regard to the amount, the last clause of said 4th subdivision is useless. Such intention would have been better expressed without it. The plain reading, then, would have been, “if the plaintiff recover judgment he shall recover his costs: *Fourth*, in all actions of replevin, and in all actions for the recovery of any debt or damages, or for the recovery of penalties or forfeitures,” and there would have been no room for construction. Such being the intention, therefore, the clause “in all cases where the Court has exclusive or concurrent jurisdiction,” is not only useless as before stated, but worse than useless, because it tends to render obscure a meaning which without it would be clear and certain.

This would not be all. By such construction, the fifth subdivision of the same section is rendered nugatory. This subdivision provides for the recovery of costs by the plaintiff, “in all

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cases where the plaintiff shall recover less than \$100, if it appear that his claim as established at the trial exceeded \$100 and was reduced by set-off" Set-offs can only be allowed in actions upon judgment, or contract for the recovery of debt or damages, (*C. L.*, Sec. 4180;) and if by this 4th subdivision the plaintiff is to recover his costs in such an action whenever he recovers judgment, without regard to the amount, then it is immaterial whether his claim established at the trial was reduced by set-off or not, and the 5th subdivision may better have been omitted.

Now it is a well settled rule that statutes must be so construed as to give effect to every part. One part must not be so construed as to render another part nugatory or of no effect.—The same rule applies to words in the construction of a statute. *People vs. Burns*, 5 *Mich.*, 114. Some other construction of this statute, therefore, must be sought for—one which will harmonize and give effect to all its parts.

By the Constitution, (Sec. 18, Art. 6.) it is provided as follows: "In civil cases Justices of the Peace shall have exclusive jurisdiction to the amount of \$100, and concurrent jurisdiction to the amount of \$300, with such restrictions as may be provided by law." Sec. 1, of the Justice's Act, restricts their concurrent jurisdiction to actions upon contract. The jurisdiction of the Circuit Court is exclusive or concurrent in all civil actions except as jurisdiction is given to Justices of the Peace.

Although the Supreme Court has wisely held that the amount in controversy, and not the sum recovered on the trial, is the test by which the Court is to determine its jurisdiction or right to try a suit and recover judgment therein, yet the Legislature in an act providing for and regulating costs merely, may have used the word "jurisdiction," in a very different sense. Costs are an incident to a judgment already rendered, and a person drafting such an act and having in view the constitutional provision before quoted, would naturally have reference to the sum *recovered*, rather than the *claim* which had been the subject of litigation. I think the word should be so applied in this instance. The last clause of said 4th subdivision, "in all cases where the Court has exclusive or concurrent jurisdiction," are words of restriction, designed to limit the general

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effect of the subdivision, which, without them, would give the plaintiff costs in all cases in which he might recover a judgment, without regard to the amount; the effect being to limit the plaintiff's right to costs, in the class of actions named, to those cases where the amount recovered by him shall exceed the sum named in the Constitution in defining the exclusive jurisdiction of Justices of the Peace.

In this way only can full effect be given to the statute, (Sec. 5597,) in all its parts. And in this way only can effect be given to that part of Sec. 5,600, of the same chapter, *C. L.*, which provides that if the plaintiff recover judgment, but not enough to entitle him to costs, the defendant shall have costs. There would be no case in which this provision could be applied if the plaintiff were to have costs in all cases in which he may recover judgment, without reference to the amount.

I am therefore of opinion that the defendant is entitled to judgment for costs.

Judgment must be entered in favor of the plaintiff for the damages recovered by him, and in favor of the defendant for his costs of suit to be taxed.



RICHARD BARNARD vs. WM. SAVIER AND GEO. W. BEISEL, Executors, &c., of GEO. DIXON, Deceased.

1. Although in Chancery the party who fails must, *prima facie*, pay costs, yet a very broad discretion belongs to the Court in regard to costs, and the right to them is not a necessary consequence of the relief prayed for and obtained; and in many cases, equity grants the relief prayed for upon condition of paying costs, or in some cases without allowing costs to either party.
2. In some cases as of mortgages or other incumbrances having a specific lien upon property, where the owner comes to relieve the estate from the incumbrances which he put upon it or those under whom he claims, the person having that incumbrance is not to be put to expense with regard to that proceeding, and so long as he acts reasonably as mortgagee, to that extent he is to be indemnified.
3. But where the Court considers the mortgagee guilty of any misconduct, in regard to the suit or the subject of it, he will not be entitled to costs.
4. Executors, administrators, &c., instituting or defending suits against strangers to their trusts, in those capacities, are subject to the same rules as to costs, as they would be if they were suing or defending in their own rights.

St. Joseph Circuit, May, 1871.

BARNARD vs. SAVIER et al.

This is a bill to have a certain mortgage decreed to be satisfied and discharged. The mortgage was originally given to George Dixon, more than twenty years before the filing of the bill, and the complainant claims to hold the land through a chain of title derived by subsequent conveyances from the mortgagor and his grantees.—The mortgage was duly recorded in the office of the Register of Deeds for St. Joseph County, but the mortgage itself, and the bond or note accompanying the same, complainant alleges is not to be found, and he claims that the mortgage is presumed to have been paid, and that the mortgage and note or bond accompanying the same has been lost or destroyed.

The executors in their answer deny all knowledge of any payment of the mortgage debt, and any knowledge of the mortgage itself, further than is shown by the record, and allege that they have searched the papers of the decedent, but cannot find the mortgage or any account whatever relating to the same, and are not willing to assume the responsibility of discharging the same, under the circumstances, as they might be held liable to the estate, and allege that from the correct business habits of the deceased, and their intimate knowledge of his business, as his counsellors and advisers in relation to his money matters in his life time, if the mortgage had been paid to him there would have been some note or memorandum of it on his books or among his papers, or they would have been likely to have known of it, or the deceased would probably have executed and delivered to the person paying the same, a discharge of the mortgage which had not been recorded by the party to whom he delivered it.

They admit that complainant had applied to them to discharge the mortgage, but that they had declined under the circumstances and for the reasons aforesaid to do so. No specific averment of payment of the mortgage by any one to the mortgagee was averred in the bill, but it appeared from the evidence that the grantor of the complainant within a year or two prior to the death of Dixon, had called upon him in regard to having him go to the Register's office and discharge it, and Dixon had told him that he would do so in a few days, but it was not convenient for him to do so then, and intimated that the mortgage was paid in full.

No allegation in regard to this interview was contained in the

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bill. On the hearing no serious objection was raised to having the mortgage decreed under the evidence to be satisfied and discharged, but each party claimed to be entitled to a decree against the other for costs, and this was the main question in dispute.

H. H. Riley, Solicitor for Complainant.

Wm. Savier, Solicitor for Defendants.

By the Court, UPSON, J.—Under our statute, as a general rule, where no special provision is made by law, in Chancery cases, the costs are to be paid by such party as the Court shall direct. 2 *Comp. Laws*, § 5596. This discretion, of course, is to be exercised in accordance with the established rules and practice of courts of equity. 2 *Comp. Laws*, § 3475.

Prima facie, the party who fails must pay costs, and it depends on him to show the existence of circumstances in a sufficient degree to displace the *prima facie* claim of costs. 2 *Mad. Ch. Pr.*, 415; 2 *Daniell's Ch. Pr.*, 1461—2, (3d Ed. ;) *Saunders vs. Frost*, 5 *Pick.*, 271—2; *Clark et. al. vs. Reed et. al.*, 11 *Id.*, 446—9.

But a very broad discretion belongs to the Court in regard to costs, and the right to costs is not a necessary consequence of the relief prayed for and obtained; there are many cases where equity grants the relief prayed for upon condition of paying costs. 5 *Pick.*, 271, 272; *Travis vs. Waters*, 12 *John's R.*, 507; *M. E. Church vs. Jaques*, 1 *J. C. R.*, 77. Cases of this kind, however, are very limited. 2 *Daniell's Ch. Pr.*, 1462.

Where both parties are equally innocent and both are endeavoring to avoid a loss caused by another, costs will not be awarded to either party as against the other. *Pendleton vs. Eaton*, 3 *J. Ch. R.*, 69.

So where both parties to a suit in Chancery, claimed what they were not entitled to, and each had succeeded as to a part of the matters in litigation between them, *Held*, that neither was entitled to costs against the other. *Crippen vs. Hermance*, 9 *Paige*, 211; *Saunders vs. Frost*, 5 *Pick.*, 260—74.

Executors, administrators and trustees, instituting or defending suits against strangers to their trusts, in these capacities, are subject to the same rules as to costs as they would be if they were suing or

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defending in their own right. 2 *Daniell's Ch. Pr.*, 1462, (3d Ed.)

But there are certain cases arising from the character sustained by the party, in which the Court generally gives the costs to that party whatever may be the result of the suit, and among these cases is that of a mortgagee or other incumbrancer having a specific lien upon property; the principle of the Court being that when the owner comes to deliver the estate from the incumbrance which he himself had put upon it, or those under whom he claims, the person having that pledge is not to be put to expense with regard to that proceeding, and so long as he acts reasonably as mortgagee to that extent he ought to be indemnified. 2 *Daniell's Ch. Pr.*, 1466 and note 2; 1 *Paige*, 48; 4 *Id.*, 527; 5 *Pick.*, 272.

But where the Court considers the mortgagee or incumbrancer guilty of any misconduct in regard to the suit, or the subject of it, he will not be entitled to costs, and in some cases he may be made to pay costs he has occasioned. 2 *Dan. Ch. Pr.*, 1470—1, and cases there cited; 1 *Paige*, 48; 5 *Pick.*, 259.

But to compel a mortgagee to pay costs there must be positive misconduct on his part to justify such a visitation upon him. 2 *Dan. Ch. Pr.*, 1472.

The general rule of the Court seems to be that the unsuccessful party, although he may be deprived of his costs never pays them.—2 *Dan. Ch. Pr.*, 1483.

There are however many cases in which the Court has refrained from awarding costs to be paid by the unsuccessful party, solely from consideration of the peculiar hardship of the individual case. 2 *Dan. Ch. Pr.*, 1482.

And where a plaintiff has slept upon his rights for a *great number of years*, and has allowed the defendant to suppose that he would not enforce them, he will frequently although successful, be deprived of his costs. 2 *Dan. Ch. Pr.*, 1478.

In this case the party under whom the complainant claims, has suffered the mortgage to remain of record undischarged for many years, and until after the death of the mortgagee, and the mortgage itself to become lost or destroyed, if the same had been paid by him and taken up, and if he did not take it up on payment, he has not preserved any written evidence of its payment. Had he preserved the mortgage, or the bond or note accompanying the same, and had he

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during the life time of the mortgagee seen fit to proceed under § 2763, 2 *Comp. Laws*, or since his death, under Act 102, of 1867, he might have compelled a discharge of the mortgage without resorting to a Court of Chancery, but in each instance he would have to pay or offer to pay the costs of the discharge.

But the executors of the mortgagee by putting in their answer, virtually denying the payment, and contesting the right of the complainant to a discharge of the mortgage, have compelled the complainant to go into full proof of his allegations, and to bring the case on regularly to a hearing on pleadings and proofs, thus adding to the costs and expenses of the proceeding unnecessarily, and it appears they were called upon to give a discharge of the mortgage before suit was commenced. Under these circumstances, therefore, although they stand in the place of, and represent the mortgagee, and deemed it their duty to protect themselves by not executing a discharge, we do not think they are entitled to recover their costs as against the complainant. Nor do we think, under the facts, that the complainant is entitled to recover his costs as against them.

Let the decree for the satisfaction of the mortgage be entered, without allowing costs to either party.

THE MICHIGAN NISI PRIUS.

SEPTEMBER, 1871.

WM. B. PADDOCK *vs.* RUFUS KIBBE, AND RUFUS KIBBE *vs.* WM. B. PADDOCK.

A commenced a suit in assumpsit, in Justice's Court, against B, February 11, 1871, returnable February 20, 1871, which was duly served, and on the return day parties appeared, and by consent cause was adjourned without putting in any pleadings, until the 15th of March, 1871.

On the 20th of February, 1871, B commenced a suit in assumpsit against A, before another Justice, returnable February 27th, and on the return day parties appeared and joined issue, the plaintiff declaring in the common counts in assumpsit, and defendant pleading the general issue only, and cause adjourned to the 28th of March, 1871.

March 15th, 1871, parties in first suit appeared and joined issue, plaintiff declaring in the common counts in assumpsit, and defendant pleading general issue only, and trial had and judgment for plaintiff, for \$17 67 damages, and \$3 27 costs of suit. March 28th, 1871, second suit tried, and judgment for plaintiff, for \$25 damages, and \$4 30 costs.

Held, notwithstanding § 3728, C. L., each plaintiff properly had judgment for costs.

Branch Circuit, June, 1871.

On the 11th of February, 1871, Paddock sued out a summons against Kibbe, in assumpsit, before a Justice of the Peace, returnable February 20, 1871, which was duly served and returned, and on the return day the parties appeared and by consent, adjourned the suit without putting in any pleadings, until the 15th of March, on which day the parties again appeared and joined issue, the plaintiff declaring on the common counts, and the defendant pleading the general issue, and the cause was then tried and judgment rendered for plaintiff against defendant, for \$17 67 damages, and \$3 27 costs of suit. On the 20th of February, 1871, Kibbe sued out a summons before another Justice of the Peace, against Paddock, in assumpsit, returnable February 27th, which was duly served and re-

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turned, and on the return day the parties appeared and joined issue, the plaintiff declaring on the common counts, the defendant pleading the general issue, and the cause was adjourned to March 28th, when trial was had and judgment rendered in favor of Kibbe, plaintiff, against Paddock, for \$25 damages, and \$4 30 costs of suit.

Each party now claims that under § 3728, 2 *Comp. Laws*, the other was not entitled to costs, the plaintiff in the first suit claiming that he was entitled to costs in each case, and the defendant in the first suit claiming the same for himself in each suit.

The question was submitted to the Court on a written stipulation, signed by the parties, embodying the foregoing facts, to be heard and decided the same as though specially raised before the Court, on appeal, and so specified in the stipulation.

M. S. Bowen, Attorney for Paddock.

J. W. Turner, Attorney for Kibbe.

By the Court, UPSON, J.—

By the statute as it formerly was in the State of New York, (and perhaps it is so at present,) if a defendant in Justice's Court neglected to plead or give notice of any set-off which might have been allowed him on the trial of the cause, he was forever thereafter precluded from maintaining any action to recover the same or any part thereof, and so were his assigns. 2 *Cow. Treat.*, 748.

Our statute in such a case, 2 *Comp. Laws*, § 3728, only prohibits the party so in default from recovering any costs, in an action subsequently brought to recover any such claim. But to entitle a defendant to set-off he must give notice of the same at the time of joining issue on a question of fact upon the merits of the cause—2 *Comp. Laws*, § 3724—and he must plead his set-off the very first opportunity. Where a plaintiff brought two suits against a defendant, each being commenced at the same time and made returnable on the same day and hour, the defendant on joining issue in the suit first called and tried, neglected to plead his set-off, and the other being then called, he offered to plead his set-off, but it was held that he was forever barred. 3 *John's R.*, 428; 2 *Cow. Treat.*, 730.

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As set-offs can only be allowed in actions founded on demands which could themselves be the subject of set-off according to law, it follows that until the plaintiff has declared in his action the defendant cannot know whether it will be on such a demand or not. 2 *Comp. Laws*, § 3723; 13 *Wentl.*, 139, 156; 2 *Cow. Treat.*, 736. Besides he is not required to plead a set-off until the time of joining issue. 2 *Comp. L.*, § 3724. And under the N. Y. statute, to be a bar to a subsequent suit for the set-off, the plea that it was or ought to have been set off in a former suit must be interposed at the time of joining issue, or it cannot be admitted on the trial. 2 *Cow. Treat.*, 731; 10 *John's R.*, 111, 246, 12 *Id.*, 455.

In neither of the suits maintained in the stipulation in this cause does it appear that at the time of joining issue, or on the trial of either, was any objection raised by any party, either by plea or otherwise, to the claim of the other party, nor was any set-off set up by either at the time of joining issue, or claimed on the trial.

The plaintiff in the second suit, who was the defendant in the suit first commenced, could not plead a set-off in the first suit until after the plaintiff had declared therein, which he did not do until after issue had been joined in the second suit and whether the burden of pleading, especially this matter, after the joining of issue in the second suit was thrown upon the plaintiff or defendant in the first suit, when the issue was subsequently joined therein, neither party availed himself of it, or raised any objections at the trial of either suit founded upon the question or matter now at issue. The issue then in the second suit seems to have been properly joined at the time it was joined and no question was raised growing out of or in reference to it on subsequently joining issue in the first suit, and going to trial, or on the trial of the second suit. The parties thus seem to have elected to try each case separately on its own merits and not to have insisted upon these provisions of the statute in relation to costs as affected by the neglect of a party to plead a set-off (§ 3728, 2 *C. L.*) in a former action; and the Justice in each case in finding for the plaintiff properly rendered judgment in his favor also for costs, and there is no error in either judgment by reason thereof.

In coming to this conclusion I have not seen fit to consider the question whether these suits could properly be reviewed in this Court on a stipulation so made and filed.

Dorr vs. Loucks et. al.

SAMUEL W. DORR vs. JEREMIAH LOUCKS et. al.

In an action brought against the owner of dogs, to recover damages for killing and "worrying" plaintiff's sheep, founded on Sec. 1845, C. L., it was held that the words, "drove, chased and hurried," used in the plaintiff's declaration, are equivalent to or within the meaning of the word, "worried," as used in said section.

The declaration alleged that the sheep were depasturing on the farm of the plaintiff, and in his possession when the wrong was done. *Held*, That this was a sufficient allegation that they were out of the enclosure of the defendant.

The plaintiff is entitled to judgment for double the amount of the verdict and costs, in such case.

Costs by said Sec. 1845, limited to \$5 00, to which, however, must be added the costs to be allowed to the prevailing party, by the Act of 1869, page 32.

Washtenaw Circuit, February, 1871.

A. E. Hewitt, for Plaintiff; *C. Joslin*, of Counsel.

G. R. Palmer, for Defendants; *H. J. Beakes*, of Counsel.

By the Court, HIGBY, J — This suit came into this Court by appeal from a Justice of the Peace. Judgment below was for the plaintiff, and defendant appealed.

The declaration was in trespass, and amongst other things alleged that the defendants, "with force and arms, and with their dogs, and dogs which they were keeping, did, contrary to the provisions of section 2, of an act of the Legislature of the State of Michigan, entitled, "An act for the protection of sheep and other domestic animals," approved March 28th, 1850, on the farm and premises of the plaintiff, situate in said town of Manchester, *drove, chased and hurried* the sheep of the said plaintiff, which were then and there in the possession of the plaintiff, depasturing, and being in and upon said farm and premises of the said plaintiff; and then and there with their dogs, and dogs which they were keeping, as aforesaid, killed a large number of said sheep, to wit: eleven sheep, of great value," &c., and claiming judgment for double the amount of damages, as provided by said statute. Plea—general issue.

On the trial by jury evidence was given tending to show that two sheep were killed by the dogs, and some eight or nine so badly wounded that the plaintiff killed them, considering their lives use-

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less, and that damage was done to the flock by driving and chasing the sheep, variously estimated from a trifling sum to \$25 or \$30.—The plaintiff recovered a verdict for \$33—the jury being instructed by the Court that they were not at liberty to take into consideration in estimating damages, the wounded sheep, as no such claim was made in the declaration. Applying the verdict to the evidence it was plain that the jury had arrived at the amount of their verdict by estimating the two sheep killed at \$4 each, and \$25 for the injury to the flock by driving, chasing and hurrying.

The plaintiff's counsel now move for judgment for double the amount of damages found by the jury and for costs. The defendant's counsel oppose this and move for a new trial, on the ground that the statute in question does not apply to damages caused by driving chasing and hurrying sheep, but for killing, wounding and worrying only, and therefore the damages found by the jury were not of the character that could be doubled. That a new trial ought to be granted because the verdict in part was for damages not specified in the statute; and being so, the plaintiff was not entitled to recover, there being no evidence tending to show that the dogs were wont to do such mischief. It was also insisted by defendant's counsel that if judgment should be in the plaintiff's favor, his costs, by the express terms of said Sec. 1645, must be limited to \$5.

I have stated somewhat fully the questions presented. The conclusions to which I have arrived are briefly as follows:

1. That the words "drove, chased and hurried," as used in the declaration, are equivalent to, or at least fall within the meaning of the word "worrying," as used in the section referred to. There may be other means of worrying sheep, but I am satisfied that the word as used in the statute embraces all that is expressed by the words in the declaration. The declaration therefore cannot be said to embrace other or different causes of action than such as were intended by the statute, and being so, it was not necessary to allege or prove that the dogs were wont to do such mischief.

2. The allegation in the declaration that the place where the injury was done was on the farm and premises of the plaintiff, and that the sheep were at the time in the possession of the plaintiff depasturing and being on said farm, particularly in a pleading in Justice's Court, is a sufficient averment that the place was out of the

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enclosure of the defendants. The proof in the case tending to show that the injury was done out of the enclosure of the defendants, and within that of the plaintiff was clear and uncontradicted, and after verdict, if necessary, the plaintiff would be allowed to amend his declaration in that respect.

But I think the averment is sufficient as it is, if it is necessary at all in this case. There is doubt whether the provision of this section of the statute in reference to "travelling the highway or out of the enclosure of the owner" of the dogs does not apply to *persons* only.

The motion for a new trial must be overruled, and judgment must be entered in favor of the plaintiff for double the amount of damages found by the jury, and for costs.

A question is raised as to the amount of costs to which the plaintiff is entitled, based on the last clause of said sec. 1645, as follows: "But in no case shall the plaintiff recover more than \$5 costs."—Under this provision and without reference to subsequent legislation the amount of costs to which the plaintiff would be entitled is unquestionably limited to \$5. The provision is general and unlimited, and applies to suits in the Circuit as well as in Justice's Courts.—By the express terms, however, of the acts of 1867, amended in 1869, (*Laws of 1867*, page 83, and 1869, page 32;) the costs there allowed to the prevailing party, are to be in addition to the fees of officers, disbursements and witnesses, as before allowed by law.

These acts make no exceptions, and apply as well to suits brought under said Sec. 1645, as to others. Costs in this case must be limited to \$5, with such additions thereto as the said act of 1869 allows to the prevailing party.

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1. Pleadings in Chancery must be actually filed and served within the time required by the rules of the Court. If served upon the adverse party or his solicitor without having been filed, such service is irregular.
2. In such case, where an order *pro confesso* had been entered, no answer having been filed, a motion to set aside the order as irregularly entered, denied; no excuse having been given for the neglect, nor any showing of meritorious grounds of defense, nor copy of answer presented to be filed.

St. Joseph Circuit, June, 1871.

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Lyman, one of the defendants in this case, applied on motion to the Court, supported by affidavit, for an order to set aside an order taking the bill as confessed against him. He claimed to have appeared and served a copy of his answer on complainant's solicitor, within the time to which by stipulation he was entitled in the case, but it appeared that not only was this denied by the opposite party, but that no answer had ever been filed in the case, and the defendant had only offered to file answer long after the time had expired, and some weeks after he claimed to have served copy. No copy of answer was presented for filing nor was any affidavit of merits made on behalf of the defendant. The Register had refused to receive and file the answer when so offered, the order *pro confesso* having been entered some time previous.

B. S. Howe, Solicitor; *Severens & Burrows*, of counsel for Complainant.

G. P. Doane, Solicitor for Defendant.

By the Court, UPSON, J.—The defendant claims to have the order *pro confesso* set aside as to himself, on the alleged ground that it was irregularly entered, for the reason that he had actually appeared and served a copy of his answer on complainant's solicitor before the time for putting in his answer had expired.

Not only is this denied by the complainant, but it also appears from the defendant's own showing that at the time of the alleged service of copy of his answer the complainant's solicitor declined to receive it, insisting that it was too late, and that at the time no answer had ever been filed in the cause, and none was ever attempted to be filed therein by the defendant, until several weeks after this, when the Register declined to receive it, the order *pro confesso* having been entered prior to the alleged service of copy of the bill.—The defendant does not come with an affidavit of meritorious ground of defence and excuse for his neglect in not answering in time, but claims it as a matter of right to have the order *pro confesso* set aside for irregularity in the entering of it, alleging that he has made no default.

He has, however, failed in his showing to make out such a case. Waiving the question of time in the first instance, it then appears

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that the attempted service was too defective to avail the defendant anything in this motion. The service of an answer is not perfect until the original is actually delivered to the proper officer to be filed, and where a pleading is served upon the adverse party or his solicitor, without having been filed, such service is irregular—although if filed on the same day, it has been held sufficient, unless some proceeding had been taken in the meantime to render such subsequent filing improper. 9 *Paige*, 252; 1 *Barb. Ch. R.*, 496.

The motion must be denied with costs, but without prejudice to the right of defendant to make a new application on a proper showing, as he may be advised.

THE CITY OF DETROIT vs. THE BOARD OF PUBLIC WORKS OF THE CITY OF DETROIT, HENRY H. LEROY *et al.*

[The questions presented in this case involve the constitutionality of the act to establish a Board of Public Works, for the City of Detroit. As the Circuit Judge refrains from discussing the points presented, the usual digest or head-note is omitted. The case will probably go to the Supreme Court and the decision will appear in the *Nisi Prius* in due time.—*REP.*]

Wayne Circuit, July, 1871.

This is a bill filed to declare unconstitutional and void an act to establish a Board of Public Works in and for the City of Detroit approved on the 18th day of April 1871, and that the Board therein named, to wit: Henry H. Leroy, William Purcell, Deodatus C. Whitwood and Julius Stoll, and the Board of Public Works thereby intended to be created, may be restrained, prevented and prohibited from exercising or assuming to exercise any powers, authority or jurisdiction or functions intended to be thereby conferred on them, and from interfering or intermeddling in any way with the Board of Water Commissioners, the Board of Sewer Commissioners, the Board of Commissioners upon the Plan of the City, the Board of Commissioners of Grades in and for the City, or from taking possession of any of the public works or other property, or from interfering with the water works, streets, parks or public grounds of the city, and that in the meantime a temporary injunction may

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issue as above mentioned; and also restraining them from commencing any action at law or in equity against the City of Detroit, or any of the said Boards above enumerated, or of any of the agents or officers of said city or of said Boards, to enforce said acts, or any part of the same, until the further order of the Court.

The first section of the bill provides that the Board shall consist of four persons, who shall be freeholders and qualified electors of said city, taken in equal numbers from the two political parties represented in the Common Council, and that the first Board shall consist of Henry H. Leroy, William Purcell, Deodatus C. Whitwood and Julius Stoll.

J. P. Whittemore, Theodore Romeyn and Lyman Cochrane, Solicitors for Complainants.

Samuel T. Douglass and J. Logan Chipman, Solicitors for Defendants.

By the Court, PATCHIN, J.—It is provided by section 3 of said act that all vacancies shall be filled by persons of the same political party as his predecessor.

The questions involved in the case at bar cannot be said to be of importance merely as between the present incumbents and the defendants who now seek to supersede them, for the reason that the former have given entire satisfaction in the performance of their several duties, and it is conceded by all that the latter are eminently qualified to fill the truly responsible position that has been proffered them. Neither are they political, for the two great political parties are equally represented.—They are rather pure questions of law relating to large and important interests, a proper consideration of which would require much more time than under the present circumstances can possibly be allowed. I am compelled, therefore, to only briefly notice a very few of the many points that have been made in the case.

It is claimed on the part of the complainant that the Legislature have no right to designate the members of the present Board.

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The Constitution provides, by article 15, section 14, that "judicial officers of cities and villages shall be elected, and all other officers shall be elected or appointed at such time and in such manner as the Legislature may direct." It is conceded by the defendants that this clause is the one under which the appointments in the case at bar were made, but it is claimed that the Legislature by designating the names of the Board itself virtually declared that that shall be the time and manner of the appointment.

It is insisted on the part of the complainants that authority to merely *direct* how the election or appointment shall be made gives no power to go beyond the mere direction; that until the condition precedent is performed by the Legislature, directing the time and manner of the election or appointment, there can be no power vested anywhere (not even in the Legislature itself) under the Constitution, to consummate the election or appointment.

The Constitution provides by article 15, section 8, that the Legislature shall pass no law altering or amending any act of incorporation heretofore granted without the assent of two-thirds of the members elected to each House, excepting municipal corporations.

It is conceded that in the case at bar the bill was not passed by a two-thirds vote.

It is claimed on the part of the complainants that the various Boards sought to be superseded by the defendants are separate and distinct corporations, none of them being municipal in their character, and that, therefore, to affect them the bill in question should have received a two-thirds vote.

The Constitution further provides, by article 18, section 1, that no other than the ordinary constitutional oath, declaration or test shall be required as a qualification for any office of public trust.

It is claimed by the complainants that the Legislature, under this clause of the Constitution, had no power to require that the members should be of any particular belief, or be connected with either of the two great parties.

This provision was undoubtedly intended for good purposes; and it is quite possible with the view many public officers

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seem to have, that they are elected to serve their political party rather than the public, whose interests they often lose sight of, it may be a wise provision were it possible to make such an one under the clause above referred to.

It will be seen that these are grave and important questions and by no means clear in favor of either party.

I do not propose to discuss the merits of these several points, or indeed to make any suggestions in regard to them. Were I so disposed, the time allowed for examination is entirely inadequate.

It is claimed that a temporary injunction, at least, should issue, because of the large interests to be affected by the radical change contemplated by this law, and that such vast and important interests should not be carelessly passed from one to another.

It will perhaps be conceded that the present incumbents would come very far short of their duty to the public, should they deliver up these vast interests without being first fully assured by the proper authorities that they had a right so to do, and I apprehend that the gentlemen composing this Board do not desire to imperil the interests of the city by any action they may take and that taking possession of these important trusts with the full assurance that they are sustained by the law and cannot be disturbed or molested, will be much more satisfactory to them, as well as all others interested, than the loose and uncertain tenure sure to follow a doubtful possession. In view of these facts I have deemed it my duty to exercise jurisdiction in the case and allow a temporary injunction to issue.

The questions involved can be finally settled in a little less than two months. A delay of so short a time cannot seriously affect any of the parties interested. It must be distinctly understood that no unnecessary delay can be allowed. I will hear counsel as to the extent of the temporary injunction.

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A license to keep and maintain a ferry, under chapter 26, of *Compiled Laws*, is a personal trust, and is not assignable.

To entitle the licensee to an injunction against one who is running upon the route of such license, he must have kept and operated a ferry in conformity with the requirements of his license.

The bond required by the licensee is a condition precedent to the enjoyment of any right under such license, and it seems that the giving and approval of such bond must be alleged in the bill of complaint.

Bay Circuit, July, 1871.

Maxwell & Hyde, for Complainant.

Luther Beckwith, for Defendants.

Motion for dissolution of injunction.

By the Court, GRIER, J.—It is alleged in the bill of complaint that on the 27th day of January, 1866, the Board of Supervisors of Bay County, under and by virtue of chapter 26, of *Compiled Laws*, granted to Christopher McDowell, since deceased, a license to run and maintain a ferry across the Saginaw River between Portsmouth and Salzburg. That thereupon said McDowell entered upon the use of the franchises and rights so granted to him, and built and maintained docks, boats, and other things necessary to such use.— That in the year 1869, said McDowell died, and his executors on the 12th day of May, 1870, sold and conveyed to the complainant said license and all the rights secured thereby, and that since then complainant has kept and maintained said ferry.

The bill further alleges that on or about the 1st day of January, 1871, the Common Council of Bay City assumed to itself authority over said ferry and granted to defendant Forsythe a license to run a ferry on the route of the complainant, and that said Forsythe is now running a ferry, and charging and receiving fare and tolls thereon to the great injury and damage of complainant. An injunction against the running and maintaining of the ferry of defendant Forsythe is prayed for. On an *ex parte* application a preliminary injunction was granted by the Circuit Judge.

The answer of defendant Forsythe admits the granting of a li-

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cense to McDowell, but denies that the executors had any power to convey the same to complainant. It denies that a ferry has been kept and maintained in compliance with the conditions of the license, and alleges and proves by the affidavits supporting the answer that complainant has violated said conditions by frequently failing to run the ferry for the accommodation of the public, and that thereby great inconvenience has been suffered. It is further alleged and proven that the Common Council under its amended charter of 1869, granted to defendant Forsythe a license to run a ferry on the route of the ferry granted to McDowell, and that under his license said Forsythe has run a ferry for the accommodation of the public, and that in consequence of the neglect of complainant such ferry is necessary.

The defendant Forsythe now moves the Court for a dissolution of the injunction upon bill and answer.

Is the license to McDowell assignable? If not, complainant acquired no rights by his purchase from the executors. To ascertain whether the license in question was the subject of sale, it will be necessary to examine the statute under which it was granted. Under that statute the Board of Supervisors may grant licenses for keeping ferries "to as many *suitable* persons as they may think proper." Such licenses shall continue in force for a time to be specified therein not exceeding ten years. No such license shall be granted to any person other than the owner of the land through which the highway adjoining the ferry shall run, unless such owners shall in writing consent thereto, or shall neglect to apply for such license after notice, as provided in the statute. The person applying must before any license can be granted to him, execute a bond to be approved by the Board, conditioned that *he will faithfully keep and attend* such ferry with such and so many convenient boats, &c., as the said Board shall direct. Every person who shall violate such bond shall be guilty of a misdemeanor and subject to a fine upon conviction thereof. It is further provided that if *any person* shall use any such ferry unless authorized in the *manner directed* in that chapter, such person shall be deemed guilty of a misdemeanor.

It will thus be observed that before a license can be granted by the Board they must pass judicially upon the *suitability* of the applicant. Although their action upon the question is not subject to

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review by any other tribunal, yet the provision referred to is for that reason no less a prohibition against their granting a license to any person who does not possess the fitness required. But this prohibition is deprived of all significance, if the licensee upon being pronounced *suitable* may at his pleasure transfer his license to any person that he may choose without any exercise of the judgment of the Board upon the fitness of the transferee to execute the duties required. The judgment and discretion required to be exercised by the Board in examining and solemnly adjudicating upon the qualifications of the person to whom it is granted, would seem somewhat farcical if the license in legal effect runs to bearer, and is valid in favor of any holder thereof without any check upon its assignability.

Again, the right or franchise conferred by the license, like a railroad, is an additional servitude not contemplated by the proprietor of the land when he dedicated the highway to the public, and cannot be granted to any person but such proprietor without his consent, or by such neglect to apply for a license as is deemed equivalent to consent. In this case the proprietors did consent that a license might be issued to McDowell, but they cannot be presumed to have thereby consented that it might be granted or conveyed to complainant. Knowing the qualifications of McDowell to exercise the trust, they were entirely satisfied with his selection, and consented thereto; but can that consent, by operation of law, broaden into an assent to the exercise of such important duties by the highest bidder at an executor's sale?

The very condition of the bond is in effect a covenant upon the part of the licensee that he will personally continue to keep and attend the ferry. His selection having been by law based upon his fitness, this condition of the bond was intended to secure to the public the services of the identical person selected. But if the license may be immediately assigned to any person at the will of the licensee without the consent of the Board, or of the proprietor of the shores, it follows that the condition of the bond may in effect be lawfully violated. By a transfer of the license it is put beyond the power of him to whom it was granted to any longer in any way control the ferry, and he thereby renders himself incapable to "faithfully keep and attend such ferry." If then the license may be lawfully sold, the result is a solecism that can hardly be tolerated by

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any reasonable system of jurisprudence, i. e. one may lawfully do that which is a violation of the conditions created by the same law which conferred the right.

The statute makes any violation of the bond a misdemeanor.— The person to whom the license is assigned cannot violate the bond for he is not a party to it. The person to whom it was originally granted cannot be held to have been guilty of a misdemeanor for an act performed by the transferee, a person not at all under his control. It results then that for any misuse after the sale of the license there can be no prosecution under this provision, and the same is rendered entirely inoperative unless it is held that the sale is in itself a violation of the bond, in which case it is a misdemeanor. It will hardly be contended that a misdemeanor may be lawfully committed.

Again, as has been shown, the use of any ferry is absolutely prohibited "unless authorized in the manner directed in this chapter." A use under a right acquired by purchase is not directed in that chapter, and the right to such a use is in no way intimated. It follows that such a use comes within the prohibition.

The conclusion would seem to be inevitable that a license granted under this statute was intended to vest nothing more than a mere trust personal to the individual selected by the Board, and that such right cannot be assigned. This conclusion is deemed to be the only one consistent with the stringent restrictions of the statute

Another insurmountable objection exists against granting the relief prayed for. It clearly appears from the answer and affidavits that the conditions of the license have not been complied with by the complainant, and that his neglect to faithfully keep and attend the ferry, has made such a ferry as that maintained by defendant Forsythe a public necessity. While it is probable that such a misuser will not of itself, without some direct adjudication of forfeiture on a competent court enable the title of the licensee to be attacked collaterally, yet if he would invoke the aid of the Court by the extraordinary remedy of injunction, he must have kept and operated a ferry that would at all times have accommodated the public. *Ferrell vs. Woodward*, 20 Wis., 458. This is but an application of the familiar rule, that he who seeks equity must do equity.

The statute makes the bond a condition precedent to the grant-

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ing of the license. The jurisdiction to grant it depends as much upon the bond as upon the consent of the proprietor of the shores. This being the case it would seem that the bill of complaint must allege the execution and proper approval of such a bond, which the bill in this case has failed to do.

The injunction is dissolved, with costs to defendant.

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- A person found drunk in the street is guilty of a misdemeanor under the statute of 1871, and a constable may, without process, arrest such person and confine him in jail until he can be taken before a magistrate.

A person who attempts to intimidate an officer by threats, and thereby to induce him to refrain from executing his official duty, is to be deemed guilty of opposing and resisting an officer, within the meaning of the statute.

Allegan Circuit, August, 1871.

The respondent in this case was charged with having resisted one Byron, a constable, while he was engaged in an effort to keep the peace in attempting to arrest and convey to jail one Brewster, for an alleged breach of the peace committed in the presence of the officer.

The evidence showed that Byron was an acting constable, and tended to show that Brewster was intoxicated in a public street in Allegan; that without any process Byron arrested him, and that while conveying him to jail he made an assault upon one Preston; that when the officer was near the jail with his prisoner, the respondent drew a revolver from his pocket and threatened to shoot the officer if he should imprison Brewster. Byron however lodged his prisoner in the jail and the revolver was not fired.

A. H. Fenn, Prosecuting Attorney, for the People.

J. H. Stone and J. F. Alley, for the Respondent.

BROWN, J., instructed the jury that to warrant a conviction they must find,

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1. That Byron was, at the time of the alleged offence, a constable of Allegan township.

2. That Byron was then engaged in an effort to maintain, preserve and keep the peace.

3. That while so engaged, the respondent either obstructed, resisted, opposed, assaulted, or beat or wounded him, Byron.

First then, have the People shown that Byron was a constable? This may be proved by evidence that he acted in that capacity. It is not necessary to show that he was actually elected.

2. Was Byron engaged in an effort to maintain, preserve and keep the peace? In determining this question it is important to determine whether there was any breach of the peace or effort to commit such breach. A breach of the peace is a violation of public order, the offence of disturbing the public peace. An act of public indecorum is also a breach of the peace. By an act of the Legislature of 1871, it is provided that "Any person who shall be drunk or intoxicated in any hotel, tavern, inn, saloon or place of public business, or in any assemblage of people collected together in any place for any purpose, or in any street, lane, alley, highway or railway car, by drinking intoxicating liquors, shall, on conviction thereof, be punished by a fine of five dollars and costs of prosecution, or be punished by imprisonment in the common jail of the county, not exceeding twenty days, or by both such fine and imprisonment in the discretion of the Court."

From this you will perceive that the being drunk or intoxicated, as set forth in the paragraph I have just quoted, is a misdemeanor. If then, you find from the evidence that Brewster was thus drunk or intoxicated in the public streets of this village, I charge you as a matter of law that he was guilty of a misdemeanor—of an act of public indecorum, and if he was so drunk and intoxicated in the presence of the officer, the officer had a right and it was his duty to arrest him, and to keep him so that he might have his body before a magistrate to answer for his offence. It is claimed by counsel for respondent that an officer who arrests a person guilty of a misdemeanor has no right to imprison the offender, but that he must forthwith take him before a magistrate. It is the duty of the officer making the arrest, to take the accused, in such case, before the magistrate without any unnecessary delay. But he may confine him in

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a prison for a short time if the circumstances of the case require it. The very act of making an arrest, is, in contemplation of law an act of imprisonment, and so long as one person is forcibly under restraint by another he is in law, imprisoned. In short, imprisonment is the restraint of a person against his will. The law requires an officer to keep an offender until he can be examined, and I charge you that if a party is found violating the law in the night time after the usual hour for transacting business or of holding court, it is the duty of the arresting officer to lock up his prisoner until the next day. There is no law requiring him to sit up and watch the offender if he can secure him by bars and bolts. And I charge you that if you find that Brewster was guilty as claimed, at between ten and twelve o'clock at night, it was the duty of the officer to keep him until the next morning, and that he had a right to keep him in the jail of the county, and that no man had a right to oppose him in the discharge of his duty.

I question very much whether even in the day-time it is the duty of an officer to take a drunken man *immediately* before a magistrate. To try a man for a misdemeanor or breach of the peace while he is intoxicated, would be a mockery of justice—would be taking undue advantage of a man who has deprived himself, temporarily, of the power of exercising reason. It would appear more sensible that the officer detain him until he becomes sober, so that he may answer like a man possessed of intellect, rather than like a fool.

It is claimed, on the part of the prosecution, that Brewster while in the custody of the officer, assaulted and beat one Preston. If you believe this testimony, then clearly he, Brewster, was guilty of a misdemeanor—was clearly guilty of a breach of the peace, and even though the original arrest had been unwarranted it furnished no justification for an assault upon Preston; hence, the continued custody of Brewster by the officer would, in law, be justified, and not only justified but demanded by the law.

3. Did the respondent obstruct, resist, oppose, or assault, or beat or wound Byron while in the discharge of his official duty?—If he did all or either of these he is guilty. I do not think a threat to an officer unless it has the effect to hinder, impede or embarrass the officer in some way, can be said to amount to an obstruction. But I have no doubt but that the drawing of a revolver upon

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an officer while attempting to execute his duty in preserving the peace, accompanying the act with the threat that the person drawing the weapon will shoot the officer if he proceeds further, amounts to resistance and opposition in contemplation of law. If therefore you find from the evidence that Byron was endeavoring to keep the peace by resort to such measures as the Court has advised you he had a right to, and if you find that the respondent there threatened him with bodily harm; if he strove against the officer; if he endeavored by intimidation to induce the officer to abandon his purpose to keep the peace, and to refrain from his efforts to execute and discharge his official duty, he would be guilty, and this, even though he had no intention to shoot the officer or to do him other bodily harm. The crime consists in thwarting or in efforts to thwart, contravene or defeat the execution of the law against offenders.

THE PEOPLE, FOR THE USE OF FRANK WHIPPLE vs. WILLIAM H. DUMPLEY, LATE SHERIFF, AND DANIEL H. COLE, ANDREW S. WELCH AND ALBERT STALEY, HIS SURETIES.

A Sheriff and his sureties in a suit upon his official bond, cannot object to any irregularity short of a jurisdictional defect in the judgment upon which the execution was issued, for the non-return of which a breach in the bond is assigned.

The failure of the Sheriff to give a new annual bond, as required by the statute, will not release his sureties from liability on account of process placed in his hands for execution before such renewal is required.

Some proceeding is necessary to declare his office vacant in case he fails to give such new bond, and he and his sureties cannot avail themselves of the supposed vacancy as a defence to the action on the bond, without special plea, or special notice of the neglect as a defence.

St. Clair Circuit, August, 1871.

This suit was commenced by declaration on a Sheriff's bond, under the statute, stating the giving of the bond, December 24th, 1866, in pursuance of the statute for Sheriff's bonds.—That Dumpley entered upon the duties of the office of Sheriff, having given and filed this, his official bond. That at the November term, 1867, of the St. Clair Circuit Court, Frank Whip-

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ple, by due course of law, obtained judgment against one Joel B. Wharton, for \$426 46, damages and costs.

That an execution upon the judgment was sued out and placed in the hands of the Sheriff, November 30th, 1867, returnable on the first Tuesday of February, 1868. That the same was properly endorsed, &c. That the Sheriff on the same day November 30th, 1867, seized and took into his possession under said execution certain lands described therein, of more value than the amount of judgment, and endorsed the levy upon the execution. Yet said Sheriff did not return the moneys as commanded in said writ, and has not at any time returned the writ nor paid over the moneys, &c., by reason whereof, &c.

The defendant plead the general issue, and gave notice that if the writ was received at all by Dumpley, it was legally and properly executed, the lands sold and certificate of sale given and properly executed and filed, and the writ duly returned.

The attorney appears for all the defendants.

FACTS FOUND.

The defendant, Dumpley, was, at the election in 1866, elected Sheriff of St. Clair County. On the 24th of December, 1866, he, as principal, and the other defendants as sureties, made and executed the bond declared upon, and filed the same after due approval, in the County Treasurer's office of St. Clair Co., a copy whereof hereto attached is made part and parcel of this finding of facts.

On the 1st day of January, 1867, Dumpley entered into and commenced the duties of the office of Sheriff, filing no other bond than the one declared on.

July 31st, 1867, Frank Whipple commenced a suit by attachment, returnable the first Tuesday of September, 1867, against Joel B. Wheaton, in the Circuit Court for the county of St. Clair, under which the lands mentioned in the declaration were attached. The return shows the attachment of the lands and that the defendant was not personally served. November 1st, 1867, affidavit of publication of notice with the notice filed.— Declaration filed the same day, and appearance and default of defendant entered November 25th. After four days in term the default was made absolute, and judgment was rendered in

THE PEOPLE vs. DUMPLEY, et al.

that suit November 26th, 1867, for \$409 31, damages, and \$27 15, costs of suit, amounting in all to \$436 46.

The affidavit, writ, notice and proof of publication, entry of default, and other proceedings in said cause, on file and of record, are made part of this, my finding.

On the 30th of November, 1867, the Clerk, at the request of the attorney for the plaintiff in that suit, issued an execution upon said judgment, directed to the Sheriff of St. Clair County, and the same was that day delivered to the defendant, Dumpley, he then being such Sheriff, with directions endorsed thereon to levy upon the land described in the attachment, and other usual endorsements. The Sheriff did not return the execution, and on the 12th day of March, 1869, over a year after the return day of the execution, the plaintiff's attorney entered a rule in the common rule book, requiring the Sheriff to return the execution, and served a copy with a notice of its entry upon said Sheriff.

The execution has never been returned nor accounted for, though the Sheriff was repeatedly requested to return it.

The Sheriff, Dumpley, levied the execution upon the lands described and attached.

After making the levy, the Sheriff during the life of the execution, advertised the lands for sale, and on the day mentioned in the notice, February 1st, 1868, they were bid off by, and struck off to the plaintiff, Frank Whipple, for the amount then due on the execution, with costs of sale, &c. The Sheriff gave Whipple no certificate of the sale or purchase, and though often requested, never has given him such certificate, and never filed any certificate of such sale with or in the office of the Register of Deeds of St. Clair County, nor returned said execution.

June 5th, 1866, and prior to the issuing of the attachment, Wheaton, the defendant in the attachment suit, made a general assignment of his property to Hiram M. Derpre, this land being included in the schedule for the benefit of certain preferred creditors, he having on the 4th of June, 1866, given a quitclaim deed of the land to Derpre, to be held in trust to pay certain debts. Whipple is not named in the assignment, schedule or deed, as one of the creditors. The assignment and deed af-

THE PEOPLE vs. DUMPLEY, *et al.*

ter naming preferred creditors, directs balance, if any, to others not named. But the assignment after mentioning certain preferred creditors, provides for the payment of all other debts.

Whipple at the time held Wheaton's note for \$500, on which \$100 had been paid, and the balance with interest was then actually due and owing to him from Wheaton. Wheaton with the exception of the assigned property was worthless and bankrupt.

The Sheriff did not renew his bond within twenty days from the first Monday of January, 1868, nor at any other time.

By the Court, MITCHELL, J.—The first material question raised is whether Dumbley ceased to be Sheriff after the 20th of January, by his having failed to renew his bond required by law.

Section 5, of Article 10, of the Constitution, provides that the Sheriff "May be required by law to renew his security from time to time, and, in default of giving such security, his office shall be deemed vacant."

Section 415, p. 207 of *Compiled Laws*, requires the Sheriff within twenty days after the first Monday in January, in each year subsequent to each election, to renew the security required to be given before entering on the duties of his office, which shall be for the same amount, approved, &c., as in the first instance.

It is claimed by the defence that if his office, after the expiration of the prescribed time, without renewing his security, as required by law, is by the Constitution deemed vacant, then his sureties cannot be held under his first bond liable for any act or omission after that time, and that the omission to give a new bond is not assigned as a breach.

"Where a Sheriff's bond is an annual one the sureties therein are liable for his defaults only during the time between the execution of the bond by them and the execution of the next year's bond." *Hewitt vs. State*, 6 Har. & J. 95.

But here no new bond was given. He continued to act and to execute process already in his hands, though his office might have been deemed vacant by the strict letter of the law. Was he not authorized and required to carry out the execution of process already in his hands, the execution of which had been

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already commenced, and would not his sureties be liable for any default or neglect in its execution until a new bond? That is, does not the bond extend to all acts commenced while that bond is strictly in force, though the particular omission complained of occur afterwards, unless a new bond has been given in the meantime? It occurs to me that the bond extended to all acts and omissions while he assumed to act as Sheriff, without renewing his bond or surety, and I so hold the law to be, and that his office was not necessarily vacant unless some steps were taken to declare it vacant.

The main condition of the bond is, that he shall well and faithfully in all things perform and execute the office of Sheriff during his continuance in office by virtue of said election. He was elected for the term of two years. Some proceedings would be necessary to declare his office vacant so as to release his sureties. But even if the office did become vacant, can the defendants avail themselves of the fact except by special notice equivalent to a plea setting up the fact in avoidance of liability? "In an action against a Sheriff and his sureties, on his bond, the surety cannot object except by plea that the bond declared upon has been suspended by a subsequent one." *Hill vs. Fitzpatrick*, 6 *Alabama*, 314. Such a plea or notice would be as essential in a case where a party seeks to be released because no new bond has been given. It is clearly special matter of defence if it is any defence.

The next proposition is, can the Sheriff or his surety avail themselves of any irregularity in the judgment not amounting to a jurisdictional defect? I find as matter of law that they cannot.

"A Sheriff against whom a recovery is sought for the failure to return an execution, cannot be allowed to object that the execution is irregular." *McKan vs. Colclough*, 2 *Ala.*, 74; *Bondurant vs. Woods*, 1 *Id.*, 543.

"In a suit against a Sheriff and his surety for neglect to pay over the proceeds of sale of land for taxes, they cannot object to the sufficiency of the judgment or execution under which he made the sale and received the proceeds," &c. *People vs. McHatton*, 2 *Gillman*, 731.

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"A Sheriff cannot question the regularity of an execution, and he is not liable for enforcing an irregular execution." *Ford vs. Treamen*, 1 N. & M., 234.

"In an action against the Sheriff for neglect or misconduct in the service of an execution he is not permitted to impeach the creditor's judgment except on the ground that it was obtained by fraud." *Adams vs. Balch*, 5 *Greenleaf*, 1885; "and even if he can for fraud he should show that he represents a creditor of the judgment debtor." *Clark vs. Foxcraft*, 6 *Greenleaf*, 2961.

It is claimed that the property sold was not the property of the defendant, and therefore the plaintiff has lost nothing.

This is hardly a proper case in which to try the title to that property. Questions of fraud and other questions affecting the legality of the transfer might arise, while the real parties in interest would not be before the Court. The plaintiff had a right to buy whatever title the judgment debtor had, and whether it should turn out good or bad was of no importance to the Sheriff. The plaintiff was entitled to the full execution and return of the process to enable him to take whatever steps might have been necessary to perfect his title. Without the return of the execution and certificate of sale he is deprived of this right, and the Sheriff and his sureties are bound to make the plaintiff whole for all the loss he may have sustained. I think the true measure of damage would be within the full value of the land, or the amount of the judgment, if the land was sold for that amount. I find it to have been sold for that amount.

I therefore find that the said William H. Dumpley, Sheriff, &c., did commit the breach of the bond assigned, and did not make return of the execution, &c. I assess the plaintiff's damages by reason thereof, at the sum of \$439 46, with interest for three years and ten months, \$116 54; total damages, \$553 00.

Let judgment be entered accordingly.

 KILDUFF vs. WILLEY.

JOHN KILDUFF vs. JOHN F. WILLEY.

K purchased before their maturity two notes executed by defendant. In an action brought by K, on the notes, and after verdict and an order of Court for a new trial, defendant for the purpose of denying the execution of the notes, asked leave to file an affidavit setting forth that the words, "at ten per cent. interest," in each of the notes were forged. *Held*, that the application would be granted only upon condition that the defendant should stipulate that the defence so set up should go no farther than to defeat the claim for interest occurring between the date and maturity of the notes, unless it should be found that K when he purchased, had notice of the alleged forgeries.

Bay Circuit, July, 1871.

John McNamara, Plaintiff's Attorney.

Maxwell & Hyde, Defendant's Attorneys.

Motion for leave to file an affidavit denying execution of promissory notes.

By the Court, GRIER, J.—This action was brought by declaration upon two notes executed by the defendant to McKinney & Co., and endorsed by them before maturity to plaintiff. Defendant did not plead in time, and on September 24, 1870, judgment by default for the amount of the notes passed against him. Upon a showing that the default was inadvertently suffered the same was set aside on the 15th of December, 1870. Thereupon the defendant without filing any affidavit denying the execution of the notes, pleaded the general issue, and upon a defence not involving the execution of the notes, a verdict was found for defendant. This verdict was afterwards vacated and a new trial ordered. The defendant now files an affidavit alleging that the words, "*at ten per cent. interest*," were not in the notes at the time he executed them, and that those words have been forged, and that he first discovered the fact on the trial of the cause, but alleges no excuse for not making this motion upon the trial. Upon this affidavit an application is made for an order allowing defendant to file an affidavit under rule 79, denying the execution of the notes.

The plaintiff claims to have been a *bona fide* purchaser of the notes before maturity. If the defence now sought should

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LANE vs. SHELLMAN.

DAVID F. LANE vs. SOLOMON SHELLMAN.

To entitle a party to a warrant, in actions upon contract, on the ground of fraud, under the third subdivision of § 3671, *C. L.*, he must show that the representations of the defendant upon which he claims to rely; that relying upon the truth of such representations he was induced to part with his property; that such representations were false, and that the defendant knew them to be false, and that he has suffered damage by reason of the premises. And the facts and circumstances tending to show the fraud must be set forth.

Kalamazoo Circuit, May, 1871.

This case comes into this Court on an appeal from the judgment of a Justice of the Peace. In the affidavit for the appeal special matters are set forth which are alleged as error. These special matters involve the question of the sufficiency of the affidavit on which proceedings were predicated in the Justice's Court.

The defendant was brought into the Court below upon a warrant issued upon an affidavit, of which the following is a copy:

"STATE OF MICHIGAN, }
KALAMAZOO COUNTY. }

David F. Lane, of Portage, in said county, being duly sworn, deposes and says, that he has, as he has good reason to believe and does believe, a demand not exceeding one hundred dollars, arising out of a contract against Solomon Shellman against whom he applies for process, by warrant, for the value of one cow, obtained by the said Solomon Shellman of deponent, by fraud.

And deponent further states that the following are the facts and circumstances which constitute his said claim and the fraud of said Solomon Shellman complained of, to wit: On the 26th day of October, A. D. 1870, said Shellman, in said town of Portage, came to deponent and offered to sell to deponent a house—that said house then stood on the premises of one A. Dustin, in said township, being the same house recently standing on the premises of Julia Sherwood, in said township.—That said Shellman said to deponent that he was the owner of said house—that no incumbrance of any kind was on it, and

LANE vs. SHELLMAN.

that no person other than himself had any claim upon it or any right or title to it.

And deponent further says that he placed full reliance on the said statements of said Shellman, and believed them to be true, and was thereby solely induced by such false representations to purchase said house of the said Solomon Shellman, and did so purchase the said house, and thereby said Solomon Shellman did fraudulently and designedly obtain from deponent the said cow in part payment of said house, which cow was of the value of sixty dollars.

And deponent says that said house was not as represented by said Shellman, his property, nor had he any right, title or interest in said house, and no right or authority to sell the same as deponent has, since the said cow was delivered to him ascertained. And deponent says that he has been defrauded by said Solomon Shellman, and thereby he has a just claim against said Shellman to the amount of sixty dollars, as the damages which he has sustained by said fraud.

D. F. LANE.

Subscribed and sworn to before me, this 27th day of October, A. D. 1870.

AMOS D. ALLEN,
Justice of the Peace."

Edwards & Sherwood, for the Plaintiff.

Hawes & Edson, for the Defendant.

By the Court, BROWN, J.—The statute, (*C. L.*, § 3671,) provides that "The plaintiff in actions arising out of or founded upon a contract shall be entitled to a warrant upon filing with the Justice an affidavit made by the plaintiff, or some one in his behalf, that the plaintiff has good reason to believe,"

"*Third.*—That there was fraud or breach of trust."

Paragraph 3673, provides that, "In all cases on application for a warrant under the third subdivision of section 19, the person applying therefor shall by affidavit show the facts and circumstances within the knowledge of the person making such affidavit, constituting the grounds of the application whereof

LANE vs. SHELLMAN.

the Justice may the better judge of the necessity and propriety of issuing such warrant." The affidavit in question is framed with a view to the arrest of the defendant on the ground of fraud in procuring from the plaintiff his property. Does the affidavit show affirmatively such facts and circumstances as tend to show that the defendant employed any trick or artifice by which the plaintiff was induced to part with his property?

The characteristic of fraud is the intention to deceive. It is true that equity sometimes recognizes constructive fraud, as where one's acts though not originating in any evil design, tend to deceive and operate substantially as a fraud upon private rights or interests. But to entitle a person to a warrant under the statute above quoted, the fraud must be actual or positive, and by this is meant the intentional and successful employment of some cunning, deception or artifice used to circumvent, cheat or deceive another.

The action in this case arises out of an alleged contract into which the plaintiff alleges he was induced to enter on account and by reason of certain misrepresentations of the defendant.—It was incumbent upon him then to show in his affidavit the terms of the contract; the representations of the defendant upon which he claims to rely; that relying upon the truth of such representations he was induced to part with his property; that such representations were false and that the defendant knew them to be false, and that he has suffered damage by reason of the premises.

These requisites constitute the ground of application for the warrant, and the statute already quoted requires the person applying for such warrant to show by his affidavit the facts and circumstances within his knowledge constituting the grounds of his application, that the Justice may the better judge of the necessity and propriety of issuing such warrant. Indeed, the Justice cannot legally judge of the necessity and propriety of issuing such warrant without the presentation of the facts and circumstances referred to. He has no right to infer fraud unless there is some legal evidence tending to establish it. The affidavit under consideration sets forth the contract and the alleged statements and representations of the defendant, and states

LANE vs. SHELMAN.

with sufficient certainty that the plaintiff believed and relied upon them, and that he was thereby induced to exchange his property for the house which the defendant claimed was his.— Following this averment the affiant uses this language: "And thereby said Solomon Shellman did fraudulently and designedly obtain from deponent the said cow in part payment of said house, which cow was of the value of sixty dollars." The word "thereby," must I think, relate to the representations referred to, so that the affidavit declares substantially that by these representations the defendant did fraudulently and designedly obtain from the plaintiff his cow in part payment for the house.— Thus far there is no direct allegation that the statements were false, and no court would be warranted in inferring from the language used that the defendant knew that fact. In the concluding paragraph of the affidavit the plaintiff avers that the "house was not as represented by Shellman, his property, nor had he any right, title or interest in said house, and no right or authority to sell the same, as he, deponent, has since the said cow was delivered to him, ascertained." In this paragraph no reference is made to the *scienter*. While the Court will not weigh the testimony produced before the magistrate in the affidavit upon a given point, yet where evidence tending to show certain facts is necessary to confer jurisdiction, and where it appears that no such evidence has been produced, the Court is bound to hold that subsequent proceedings before such magistrate were unauthorized. The mere fact that a statement is declared to be false, is not to be taken as *prima facie* evidence that the person making such statement knew it to be false, nor is an allegation in the affidavit that the party made certain statements and that he thereby fraudulently and designedly obtained deponent's property, to be taken as evidence of *scienter*. Such an allegation is merely a conclusion and not the statement of facts and circumstances from which the magistrate can legally draw a conclusion. This view of the case renders it unnecessary to consider the other points raised.

The judgment of the Justice must be reversed, annulled and held for naught.

THORP vs. THORP.—THE PEOPLE vs. GERMAN ROUSE.

MARGARET C. THORP vs. WM. T. THORP.

A Circuit Court Commissioner has no authority to make an order allowing alimony.

Manistee Circuit, 1871.

S. W. Fowler, for Complainant.

Benedict & Ramsdell, *Contra*.

By the Court, RAMSDELL, J.—Under our statutes a Circuit Court Commissioner has no jurisdiction to hear an application and make an order for alimony, and the order heretofore made by D. W. Dunnett, Circuit Court Commissioner for this county, for that purpose, in this case is therefore void.



THE PEOPLE vs. GERMAN ROUSE.

A person guilty of adultery may be convicted of fornication, where the information is for fornication, as adultery embraces fornication. And where a person is charged with adultery he may be convicted of fornication.

Upon a trial on an information for incest, where the proof tended to show that the intercourse was forcible and against the will of the complaining witness with whom the intercourse was had, *Held*, that the accused might be convicted of incest, even if the jury should find that the force used was such as under the circumstances, to amount to rape.

Allegan Circuit, August, 1871.

The facts in this case sufficiently appear in the charge of the Court.

A. H. Fenn, for The People; *M. D. Wilbur*, of counsel.

John W. Stone and *Silas Stafford*, for Respondent.

Charge of the Court, BROWN, J.—*Gentlemen of the Jury* :—

The information filed in this case alleges that "German Rouse, late of the township of Leighton, in the county of Allegan, on the

THE PEOPLE vs. GERMAN ROUSE.

first day of May, A. D. 1870, at the township of Leighton, in said county of Allegan, did commit fornication with one Ida Rouse, by having carnal knowledge of the body of her, the said Ida Rouse, she, the said Ida Rouse, being then and there the daughter of Elliot Rouse, the brother of the said German Rouse, and the niece of the said German Rouse."

The statute under which this information is filed, § 5870, *C. L.*, is as follows :

"All persons being within the degree of consanguinity within which marriages are prohibited, or declared by law to be incestuous and void, who shall intermarry with each other, or who shall commit adultery or fornication with each other, shall be punished by imprisonment in the State Prison not more than fifteen years, or in the county jail not more than one year." This statute includes those cases where the parties sustain the relation of uncle and niece ; where the intercourse is between a man and his brother's daughter.

In order to warrant a conviction of the respondent, it is incumbent on the people to prove, beyond a reasonable doubt—to prove to your entire satisfaction (you giving the respondent the benefit of any and all reasonable doubts :) :

1. That the respondent did commit fornication with Ida Rouse.
2. That Ida Rouse is, as claimed by the prosecution, the daughter of respondent's brother.

By fornication, is meant illicit carnal connection ; unlawful sexual intercourse. This unlawful intercourse, unaccompanied by any circumstances which tend to aggravate it, is simple fornication ; and when as the result of such fornication a child is born, it is called bastardy. If a man who is married is guilty of unlawful sexual intercourse, we call it adultery in him. When the act is between parties sustaining relations to each other within certain degrees of consanguinity or affinity, we call it incest. Where the female consents to unlawful intercourse through fraudulent acts, including a promise of marriage, we call it seduction. In each case the essential fact which constitutes the crime is fornication. *Wharton's Cr. L.*, p. 975, § 2669, note *d.* So that to warrant a conviction for adultery, fornication must be proved. If in a prosecution for adultery the prosecutor fails to show the marriage, but shows the fornication, the accused may be convicted of fornication. In short, every adul-

THE PEOPLE vs. GERMAN ROUSE.

tery embraces fornication, and is only called by a different name to indicate that not only the offence of unlawful carnal intercourse was committed, but that the sacred obligation of the marital relation has been violated.

I therefore advise you that the fact that the respondent is shown to have been a married man at the time of the alleged offence, is no bar to a conviction for fornication; and if guilty of fornication with his niece he is guilty of incest.

Counsel for the respondent contend that if the evidence in this case satisfies you that the alleged intercourse between the respondent and the complaining witness was forcible and against the will of the complaining witness, the crime of the respondent would be rape and not fornication. This question is not, perhaps, entirely free from doubt; and I approach the consideration of the question thus presented with some misgivings. It has been held in an indictment for fornication and bastardy that the testimony of the prosecuting witness that the accused forced her, worked himself under her, and in that way forced her, and that she did not give her consent, was not such as to merge the offence charged in the crime of rape, but that the defendant might be legally convicted of fornication. *Com. vs. Parr*, 5 *Watts & Serg.*, 345 In New York, it has been held that consent is essential to the crime, and that if the connection is accomplished by force, the crime is rape and not incest. *People vs. Harri-*
den, 1 *Park.*, 344. But there can be no such thing as rape without carnal knowledge—without a *penetration of the female*. It is true that the essence of the crime is not the fact of intercourse but the injury and outrage to the modesty and feelings of the woman, by means of the carnal knowledge effected by force. And still, as the carnal knowledge in such case is voluntary and unlawful on the part of the man, it would seem to come within the definition of fornication; and it seems to me that rape is but fornication aggravated by the force employed in accomplishing the act, against the will of the person upon whom the offence is committed.

EVANS vs REED et. al.

**SAMUEL EVANS, Plaintiff in Error, vs. GEORGE L. REED AND
JAMES F. WEAVER, Defendants in Error.**

A mere transcript of the minutes of proceedings in a case in Pennsylvania, without giving the record of pleadings, proceedings and journal entries, does not constitute a record of judicial proceedings under the Act of Congress of May 26, 1790.

The renewal of a judgment in Pennsylvania by *scire facias* without service, only keeps in force the local lien, and does not constitute a new judgment against the person so as to prevent the operation of the statute of limitations.

Such new or revised judgment does not constitute an original judgment upon which a party may be sued in this State. It is based upon and controlled by the original judgment and subject to all its limitations except the local lien given by the statute of the State where rendered.

Macomb Circuit, January, 1871.

Certiorari from Justice's judgment.

Defendants in error were plaintiffs in the Court below.

The declaration was verbal in assumpsit upon a judgment rendered in the Court of Common Pleas, in Clearfield County, in the State of Pennsylvania, at the March term thereof, in the year one thousand eight hundred and sixty-seven, on the 20th day of March, for one hundred and ninety-two dollars and thirty cents, damages and costs of suit, in favor of said plaintiffs and against said defendant, and claims three hundred dollars damages.

Plea, general issue, and notice of the statute of limitations.—That there was no record of the judgment, and that there was no service of process to warrant the judgment declared upon, and defendant had no notice of any of the proceedings.

On the trial the plaintiff introduced, under due certificates, an exemplified copy of the judgment and proceedings, as follows :

“ Amongst the records of the Court of Common Pleas of Clearfield County, Pennsylvania, to No. 165, January term A. D. 1857, is contained as follows, to wit :

APPEARANCE DOCKET ENTRY.

W. B. & F. Reed & Weaver.	D. S. B. on single bill, dated 14th
14 Feb'y. vs. 165.	February, A. D. 1857, with
Samuel Evans.	warrant Prothonotary to confess judgment, and conditioned

EVANS vs. REED et. al.

Proth'y W. Pth, \$1 12½.*Sci. fa.* to 43½, Sept. T. 1863.*Al. sci. fa.* to 102, March T.,
1867.to pay plaintiff the sum of one
hundred and nineteen dollars
and thirteen cents, one day af-
ter date, with interest from
date, with costs of suit, release
of errors, &c.

Read, Debt, \$119 73.

Int. from 14th Feb'y, 1857.

Entered and filed, 14 Feb'y, 1857.

Judgment.

GEORGE WALTERS, Proth'y."

" LIEN DOCKET ENTRY.

Revived—Evans, Samuel.

Reed & Weaver.

No. 165, Jan'y T., 1857.

Entered 14 Feb'y, 1857.

Debt, \$119 13.

" COPY OF PRÆCIPUE.

In the Court of Common Pleas of Clearfield Co., Pa.

Reed & Weaver }

No. 43½, Sept., T. 1866.

vs.

Samuel Evans }

Issue *scire facias* to revive.
Judgment No. 165, Jan'y T., 1857.

WALLACE, BIGLER & FIELDING,

Att'ys for Pl'ffs.

22 June, 1866."

" To Proth'y of the Com. Pleas,

' September Term, 1866.'

' Appearance Docket Entry' of *Scire Facias*.*Scire Facias* to revive Judgment.W. B. & F. Reed & Weaver }
29 June. vs. 43½. }

Samuel Evans. }

No. 165, January T., 1867.

N. E. I.

So ans. Sh'ff Faust.

Pro. E. Carried forward. 125.

Sh'ff Faust. 50.

Al. Scire Facias to No. 102, March, 1867."

" Clearfield County, ss.

The Commonwealth of Pennsylvania.

To the Sheriff of Clearfield County, Greeting :

EVANS vs. REED et. al.

Whereas Reed & Weaver, on the 14th day of February, in the year of our Lord one thousand eight hundred and fifty-seven, obtained judgment in our County Court of Common Pleas of Clearfield County, before our Judges at Clearfield, against Samuel Evans, late of your county, yeoman, as well a certain debt of \$119 13, lawful money of the United States, with interest from 14th February, 1857, as also \$1 12½ like money, which to the said plaintiff in our said Court we awarded and adjudged for their damages which they sustained by occasion of the detention of that debt, whereof the said defendant was convict, as appears to us of record, &c.; yet execution of said judgment still remains to be made, as we have been given to understand by the said Reed & Weaver, who hath besought us to provide for them a proper remedy in that behalf; and we being willing that what is right in that behalf should be done, Therefore:— We command you that by honest and lawful men of your bailiwick, you make known unto the said Samuel Evans that he be and appear before our Judges at Clearfield, at our County Court of Common Pleas, there to be held for Clearfield County, on the second Monday of September next, to show if any thing for him he has, or knows to say why the said plaintiff should not have the above judgment revived to continue the lien; and also why the said plaintiff should not have execution against him for the said debt and damages, according to the form, force and effect of the recovery and judgment aforesaid, if to them shall seem expedient.

And further to do and receive what our said Court shall in that behalf consider and direct. And have you then and there the names of those by whom you shall make it known unto him, and this writ.

Witness the Hon. Samuel Linn, President of our said Court,
at Clearfield, the 29th day of June, Anno Domini, one thousand eight hundred and sixty-seven.



D. F. ETZWEILER,
Prothonotary."

(Returned on back.)

To the Honorable Judges, &c.

N. E. I.

So ans. Sh'ff Faust.

EVANS vs. REED *et. al.*

"COPY OF PRAECIPE.

In the Common Pleas of Clearfield County, Penn.

Reed & Weaver	}	Original No. 165, Jan'y T., 1857.
vs.		(See 434, September T., 1866.)
Samuel Evans.	}	Issue <i>Alias Scire Facias</i> , to revive above
		judgment—Returnable 21 March 1867.

WALLACE, BIGLER & FIELDING,

To Proth'y Com Pleas.

Atty's for Pl'ffs.

9th March, 1867."

"COPY OF STATEMENT.

In the Common Pleas of Clearfield County, Penn.

Reed & Weaver	}	Or. J., No. 165, Jan'y T., 1857.
vs.		No. 102, March T., 1867.
Samuel Evans.	}	Debt, \$119 13.
		Int. from 14 Feb'y, 1857, to 14 March, '67, 72 04.
Cost paid by pl'ff,		1 13.

New Debt,	\$192 30.
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Int. 14 March, '67.

To Proth'y Com. Pleas.

WALLACE, BIGLER & FIELDING,

Atty's for Pl'ffs.

11 March, '67."

[Here follows another writ of *Scire Facias*, with same return enclosed as above copy of writ, except it is dated March 11, 1867, and made returnable the 3d Monday of March, 1867. The record then continues:]

"MARCH TERM, 1867.

COPY OF APPEARANCE DOCKET ENTRY.

W. B. & F. Reed & Mason	}	Alias <i>Scire Facias</i> to revive Judgment No. 165, Jan'y T., 1857. (See 434, Sept., 1866.)
vs.		
Samuel Evans.	}	So ans. Sh'ff Faust. And now 20 March, 1867, on reading the docket in open Court, and no appearance by defendant, on motion of Wallace, Bigler &
Pro. E., cost,	\$1 25	
Pro. E.,	3 01	
Sh'ff Faust, cost,	50	
Att'y,	3 00	
Too late for record,	

EVANS vs. REED & al.

Paid by pl'ffs,

2 50

Fielding, Esqs., judgment in favor of the plaintiffs for the sum of one hundred and ninety-two dollars and thirty cents.
Debt, \$192 30.
Int. 14 March, 1867.

By the Court.

Judgment.

D. F. ETZWEILER, Proth'y."

" LIEN DOCKET ENTRY.

Evans, Samuel

Reed & Weaver.

No. 102, March T., 1867.

Entered 20 March, 1867.

Debt, \$192 30."

COPY OF NOTE

" One day after date, I promise to pay the order of Reed & Weaver, the sum of one hundred and nineteen dollars and thirteen cents, with interest from this 14th day of February, A. D. 1857, for value received, without defalcation, and further I do hereby empower the Prothonotary or any attorney of the Court of Common Pleas of Clearfield County, or elsewhere, or any court of record, to appear for me, Samuel Evans, and after one or more declarations filed as of the last, next or any subsequent term, to confess judgment against me for the above sum, with cost of suit, release of errors in the entering of said judgments or issuing any process thereon.

Witness my hand and seal, the 14th day of February, A. D. 1857.

In the presence of
W. W. BETTS.

SAMUEL EVANS. [SEAL.]

The above constitutes the entire record as produced and proved before the Justice, with the exception of the *alias writ Sire Fucias* above referred to in parenthesis, and also excepting the certificates of authentication.

On producing this record the plaintiffs rested their case.

On the part of the defendant, it was proved that the defendant had lived in the State of Michigan since January, 1857;

EVANS vs. REED *et al.*

that no process for the renewal or revival of the judgment was ever served on him, and that he knew nothing of the proceedings by *scire facias* to revive the judgment. Some other matters relative to payment and arrangements to pay the note were proved, but not deemed necessary to refer to in deciding the question involved.

The Justice rendered judgment for plaintiff for amount claimed.

K. P. & J. B. Eldridge, for Plaintiff in Error.

Hubbard & Coker, for Defendants in Error.

By the Court, MITCHELL, J.—The record of a judgment as presented, is so imperfect as to scarcely warrant its being received as a judgment record. It does not in fact purport to be a judgment record, but only copies of the minutes of proceedings.

It is true that by the Act of Congress, of May 26, 1790, "the records and judicial proceedings of the courts of any State, shall be proved or admitted in any other court within the United States, by the attestation of the Clerk and the seal of the Court annexed, if there be a seal, together with a certificate of the Judge, Chief Justice or presiding magistrate, as the case may be, that the attestation is in due form, and that the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from whence said records are or shall be taken."

Whatever there is of the supposed records produced is duly authenticated.

But the question arises, what is a record? It ought to be something more than a mere minute of proceedings, and that is all that appears by this certified copy.

So far as the proceedings produced and authenticated are concerned, there appears neither writ, declaration, plea or appearance, and in fact nothing that is usually deemed necessary to constitute a record of a judgment.

EVANS vs. REED *et al.*

So far as appears all matters certified are the mere minutes of the Clerk or Prothonotary, from which a record was to be or should be made up.

It seems to me that a mere certificate of a Clerk of a Court that a judgment was entered on a certain day, in a certain court, between certain parties, would be as much of a record as that produced. But it is not necessary to determine as to the validity of the judgment in 1857, or as to the sufficiency of the certified record in that respect. As to the defendant, he living in the State since its entry, and the plaintiffs living within the United States, action upon that judgment would be barred by the statute of limitations.

But the declaration is upon a judgment of March 20th, 1867. The only effect of that judgment is to renew and keep in life any lien the plaintiff may have had in the State of Pennsylvania, under the original judgment of 1857, upon the defendant's property in that State.

It cannot go to the extent of binding the defendant personally, who was a resident of another State, and who was not served with and had no notice of the process.

The very words of the *scire facias*, the renewal process requiring the defendant to show "why the said plaintiffs should not have the above judgment revived to continue the lien," &c., indicates that it was so treated and regarded in that State. It would be extraordinary to give the judgment of revival greater force or effect than it would have in the courts where rendered. To say that a judgment can be rendered in any court where there is no service, is a violation of all rules, except in cases where the process affects property seized or held under it, and then only as to the property so held.

In this case the return of the two writs of *scire facias* or renewal writs is "*N. E. I.*" (*non est inventus*.) "So ans. Sheriff Faust," clearly showing that there was no service upon the defendant.

Held, That the judgment declared upon is not a judgment upon which the defendant can be held personally liable in this State, and that as to the original judgment it has been barred by the statute of limitations.

Judgment reversed, with costs.

THE MICHIGAN NISI PRIUS.

NOVEMBER, 1871.

GEORGE PERCIVAL, *Plaintiff in Error*, vs. WILLIAM H. TUCKER,
Defendant in Error.

Where a constable makes return to a writ of attachment, issued by a Justice of the Peace, that he left a copy of the writ and inventory with the person in whose possession he found the goods, but omits to state whether the defendant has or has not "a last place of residence in the county," the defendant not appearing in the suit; the Justice is not authorized to retain the case; and a judgment rendered against the defendant under such circumstances, will be reversed.

Van Buren Circuit, August, 1871.

Certiorari to Justice's Court.

A writ of attachment was issued from a Justice's Court, and levied upon the goods and chattels of the plaintiff in error. The return of the officer serving the writ, was as follows:

"By virtue of the within attachment, I, William Mead, on the 26th day of May, 1871, seized the goods and chattels of the defendant, mentioned in the inventory, of which the annexed is a copy, and on the same day I left a copy of the within attachment and of the said inventory, with Cullen Percival, duly certified by me, in whose hands I found the property—not being able to find the said defendant.

WILLIAM MEAD, Constable."

On the return day of the writ, June 3d, 1871, the cause was adjourned until July 5th, 1871.

The defendant not having appeared in the cause, the plaintiff

PERCIVAL vs. TUCKER.

introduced his evidence, and the Justice thereupon rendered judgment in favor of the plaintiff.

Foster & Coleman, for Plaintiff in Error.

Wm. H. Tucker, Defendant in Error, in person.

By the Court, BROWN, J.—Of the nine assignments of error urged as grounds for a reversal of the judgment in this case, it is only necessary to consider the second, which raises the question of the Justice's jurisdiction.

It is well settled that in this class of cases the requirements of the statute must be complied with in order to confer jurisdiction. The statute, § 3680, C. L., provides that, "If the defendant cannot be found within the county, the constable shall leave a copy of the attachment and inventory certified by him, at the last place of residence of the defendant, if there be any such place within the county, and if not, then by leaving the same with any person in whose possession such goods and chattels, moneys and effects, may be found."

The return of the officer shows that the writ was left with the person in whose possession the goods were found. If the defendant could be found in the county the service should have been upon him; if not, then by leaving the writ and inventory at his last place of residence, if there be any such place in the county; if the defendant cannot be found in the county, and if there be no such place as his last place of residence in the county, the officer may serve the writ and inventory upon the person in whose possession the goods were found; and this latter mode of service can be made legally only when neither of the other modes of service can be effected. This being so, the return of the officer should have shown affirmatively that neither of the first two modes of service could be made. In the absence of such return the Justice was not warranted in retaining jurisdiction. See 18 Wis., 397; 9 Id., 342; 19 Mich., 78; 2 Ill., 212; 15 Ohio, 435; 2 *Wait's Law & Prac.*, (2d Ed.) 174; 2 Mich. *Nisi Prius*, 164.

The judgment of the Court below must be reversed, with costs to plaintiff in error.

ONEIDA NATIONAL BANK *vs.* PALDI *et. al.*

THE ONEIDA NATIONAL BANK *vs.* ANGELO PALDI AND LEWIS
D. PALDI.

"Perishable property," in the statute providing for its sale, (*Comp. Laws*, 1274, § 4767,) when seized under attachment means only property in its own nature perishable, and not property which by extraordinary exposure may be liable to loss or destruction, if so situated that its safety can be provided for by the attaching officer.

St. Clair Circuit, 1871.

Application to Judge for an order to sell the personal property attached, for the reason that, as alleged, the property is perishable.

By the Court, MITCHELL, J.—The statute, Sec. 4767, *Comp. Laws*, provides for the sale, under the Circuit Judge's order, of "animals or perishable property" seized under an attachment, upon due proof of the perishable character of the property seized.—What proof is necessary is not provided by statute.

The affidavit on behalf of the attaching creditor in this case states that the property seized consists of a portable engine and boilers, a lath and shingle mill, gearing, belting, shafting and other machinery and articles usually connected with such an engine and machinery, situate on the lands of one of the defendants, at a remote place in the woods, from whence it cannot easily and without injury be removed, and that it is liable to loss by trespass and theft or otherwise as now situated, and that to keep it safely requires two watchmen at a cost of four dollars a day, and if so held until judgment passes will cost to take care of it about five hundred dollars, while the whole value is about three thousand dollars.

It does not occur to me that the property described comes within the class of property meant or intended by the statute under the designation "perishable."

I think the statute means property perishable in its own nature or character, and not property that is or may be subject or liable to loss by trespass, larceny or fire.

If such is not the meaning of the statute, then a stock of goods or almost any possible description of personal property may be put in the class of perishable, if it happens to be in an exposed condition or situation.

STILSON et al. vs. GREELEY et al.

If all such exposed property was intended to be covered by the statute, why did not the statute distinctly and in terms include property liable to loss by trespass, theft or fire, or by exposure.

If the property is in the exposed or dangerous condition claimed, then it is clearly the duty of the Sheriff to remove it to a safer place, at least all parts of it liable to be removed or taken away by other persons, by trespass or otherwise.

Order for sale refused.

JOHN STILSON et al. vs. CHARLES GREELEY et al.

Objection to the misuse of the process of the Court for the purpose of acquiring jurisdiction of the person, must be made at the first opportunity and before plea, or it will be deemed waived. It will not be heard on a motion to change venue after appearance and issue joined.

In a transitory action the defendant who might have objected to the jurisdiction over his person, will be deemed to have waived such objection, after issue joined.

Trover for logs cut from land is not a local action but will be tried in any court obtaining jurisdiction of the person.

Title to land cannot be tried in a transitory action against the actual occupant claiming adverse title.

St. Clair Circuit, 1871.

Motion to change venue.

This suit was commenced by summons issued November 9th, 1869, returnable the 1st Tuesday of December, 1869, and served on some of the defendants November 9, 1869. Orrin Erskine, was not served.

On the 27th of November, 1869, Mr. Chadwick entered the appearance of the defendants served.

The declaration was filed on the 27th of December, and plea filed January 27th, 1870.

April 26th, a stipulation was made for taking the testimony of defendant's witnesses at Alpena, and that the cause should stand for trial at the ensuing May term. The cause was not reached or for some other reason went over that term.

The cause was noticed for trial at the September term, 1870, and tried 29th, the jury failing to agree upon a verdict.

November 8th, 1870, the defendants made and filed an affidavit and entered a motion for change of venue.

STILSON et. al. vs. GREELEY et. al.

Motion brought on to be heard this day, August 7th, 1871, efforts having been made to have it heard at former times, but delayed for want of time or convenience of parties.

The affidavit upon which the motion is based, alleges :

That the action is trover for lumber and logs cut from lands in Alpena County.

That the whole subject matter of the suit arose in Alpena County.

That all the defendants were at the commencement of the suit and still are residents of Alpena County, except Charles Oldfield, who is a non-resident of the State, residing in Ontario.

That neither of the plaintiffs were residents of St. Clair County at the time of commencement of suit.

That defendants have, as advised by counsel, a good and substantial defence on the merits.

That by a device and trick, under pretence of a subpoena to testify in a case not then at issue, defendants were brought into St. Clair County, where process was served upon them and that such service while under a subpoena as witnesses was an abuse of the process of this Court—yet, the defendants believing they had a good defence, pleaded in this cause and went to trial, when the jury disagreed.

That each of the defendants is a material witness in the cases and twenty other persons, naming them, all residents of Alpena County, are also material witnesses for the defendants, most of them as to the value of the property alleged to have been converted, making twenty-three in all, and without the testimony of each they cannot safely proceed to trial.

This affidavit is made by two of the defendants and the one not served, and who does not appear. The other defendant does not join in the affidavit, nor is any reason shown why he does not, except that he is stated to be a resident of Ontario, and a non-resident of this State.

The depositions of George and Charles Erskine, and Charles Greeley, three of the defendants, and three of the other witnesses named, were taken under the stipulation, and filed June 29th, 1870.

The counter affidavit of plaintiffs states :

That both of the plaintiffs are residents of St. Clair County, but

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it does not state that they were at the commencement of the suit.— That they have a large number of material witnesses who reside in St. Clair County, naming them, including themselves, thirteen in all, each of whom is material.

By the Court, MITCHELL, J.—The first question raised in the motion, and perhaps the one most seriously urged, is, that the service upon the defendants was procured by the fraudulent use of the process of this Court, a subpœna issued, as is claimed, for the purpose of bringing the defendants within this jurisdiction, for the sole purpose of commencing this suit in this county, and not in good faith to procure their attendance as witnesses in a cause at issue.

If before appearance generally or pleading, a motion had been made to dismiss the suit or quash the writ for that reason, and the fact had been satisfactorily established, there would have been no hesitation in granting the motion.

The use of the process of the Court under one pretext and for an entirely different purpose such as forcing a party within the jurisdiction of the Court to get service would be a gross abuse of the process and machinery of the Court, and would not be allowed when brought to the notice of the Court in proper time.— But if the party comes into Court and voluntarily pleads and submits to the jurisdiction, he cannot afterwards take advantage of the improper manner in which the jurisdiction was acquired.

Such a motion is in the nature of a plea in abatement, which is never received after plea in law, unless pleaded *puis duriem continuance*, for such reason arising since the last continuance.— 1 *Burrill's Practice*, 152.

If the subject matter is not within this jurisdiction, that may be taken advantage of under the "general issue" whenever the want of jurisdiction is made apparent.

It is therefore unnecessary to pass upon the question whether any such fact has been established, and I do not pass any opinion upon what has been proved or not proved in that respect.

It is clear that the manner of acquiring jurisdiction of the person of the defendant, is not proper matter to be considered on a motion to change the venue.

The second reason is that the defendants and their wit-

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nesses, to a large number, reside in a distant county, where the cause of action arose, and it is at great inconvenience that they or their testimony can be procured in this county.

The plaintiffs also show that they have a large number of witnesses resident in or near St. Clair County and at a distance from Alpena.

The affidavit to change venue should properly be made by all the defendants served with process unless they suffer default and refuse to appear; at least, they must all join in the motion.

If the motion is grounded upon the convenience of parties and witnesses, the affidavit should state the names of the witnesses residing in the county to which the venue is proposed to be changed and their residence, stating the town, village or particular place of residence, in addition to the county; 6 *Cowan*, 389; 1 *Hill*, 671; 1 *Howard*, 195; and that each and every one of them is material to the defence, as the defendants are advised by counsel and verily believe, and that without the benefit of the testimony of each and every one of them they cannot safely proceed to trial, as advised by counsel and as they verily believe, and that they have a good and substantial defence on the merits, as advised by counsel and as they verily believe, and if not made by all the defendants it should show the reason why. It is well to state also the nature of the controversy, and when the cause of action or the defence arose, and these facts should be taken into consideration in fixing the place for trial.

The plaintiff may resist the motion by showing material witnesses residing in or near the county where the venue is laid. In the State of New York, the plaintiff under their *Nisi Prius* practice, where in a case in the Supreme Court the plaintiff laid the venue in any county most convenient to himself, or even by his own caprice, the plaintiff was required in order successfully to oppose the motion, to swear unqualifiedly that he had witnesses in or near the county, of an equal or greater number with the defendant, or the venue would be changed.

Special rules as to changing venue in that State were required and made growing out of this judicial system.

There is no doubt that all required by these rules for the defendant to show in order to change a venue should be re-

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quired here. Whether as full a showing will be required to defeat the motion, would be subject of doubt.

In some of the cases it is said that if a party swears to a great number of witnesses as material, it will be considered as a fraud upon the Court, especially upon questions of value, unless so explained as to satisfy the Court that the number of witnesses is necessary.

I have given these rules somewhat at large not as criticisms on the affidavits presented, as most of the rules are complied with, but because motions to change a venue in this State are rare and seldom made, at least the Supreme Court has never had occasion to pass upon any such motion, or rather no such matter has found its way into the reports, and from the nature of the motion, it being discretionary with the Circuit Courts, it is highly improbable that our Supreme Court will be called to decide upon the subject

Our statute provides (Sec. 3420 *Comp. Laws*.) that each of said (Circuit) Courts, upon good cause shown, may change the venue of any cause pending therein, &c.

Unless there is a clear abuse of this discretion, the decision of the Circuit must be final.

There is, however, another rule as to changing venue not yet considered; that is as to the time when the motion should be made, if the change is sought for the convenience of parties and witnesses.

It ought regularly to be made before issue joined—4 *Cowen*, 554; 11 *Wendell*, 186;—but it may be made after issue, if a trial has not been lost, and no delay will be produced, otherwise it will be refused.

In this case the defendants have not only plead, but have taken the deposition of all the defendants and other of the witnesses named in their affidavit, and have gone to trial and had a disagreement of the jury. It would seem rather late now to make or grant the motion at so late a stage in the case for the convenience of parties and witnesses.

There is still another question raised by the motion, and that is whether the action as stated and claimed is local or transitory.

The act of 1861, *Sess. Laws*, p. 173, and as re-enacted in 1871, *Sess. Laws*, '71, p. 37, makes the action of trespass on lands, or trespass on the case for direct or consequential damages to personal

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property, when the defendant is not an actual resident of the county in which such lands are, a transitory action.

Sec. 2, of chapter 103, of *Revised Statutes*; Sec. 4344, of *Comp. Laws*, as amended in 1869—*Sess. Laws*, '69, p. 9, provides :

“ Issues of fact shall be tried in the proper county, as follows :

“ 1. Actions for the recovery of any real estate or for the recovery of the possession of real estate ; actions for trespass on lands, and actions of trespass on the case, for injuries to real estate, shall be tried in the county where the subject of the actions shall be situated.

“ 2. Actions of slander, for libels, and all other actions for wrongs, and upon contracts, shall be tried in the county where one of the parties shall reside at the time of commencing such action, unless the Court shall deem it necessary for the convenience of parties and their witnesses, or for the purpose of a fair and impartial trial, to order such issue to be tried in some other county, in which case the same shall be tried in the county so designated.”

This amendment is a *verbatim* re-enactment of the section as it stood in the *Compiled Laws*, except the words, “ joined in such actions,” are left out, which under the law as it was, would appear to limit the provision to actions arising in Probate Courts. The repeal of this provision as to Probate Courts, made it necessary to re-enact section 2, of the chapter, and make it applicable to all issues of fact.

By the defendant's affidavit it appears that all the defendants but one, (who is a non-resident of the State,) were and are residents of Alpena County, and that neither of the plaintiffs at the time of commencement of suit was a resident of St. Clair County.

This is not denied by plaintiffs except they swear they are non-residents, &c., but I think it an objection to the local jurisdiction of the person that should have been made and taken advantage of before issue joined, or at least before proceeding to trial, and that this objection has been clearly waived.

“ If a defendant in a transitory action appear without objection. the Court will have jurisdiction although the action be improperly brought in a county where neither of the parties reside, but it will be otherwise in the case of a local action.” *Webb vs. Godard*, 46 *Maine*, 505.

STILSON *et. al.* vs. GIBBLEY *et. al.*

But the defendant's affidavit also states that the action is for trover for the conversion of logs in Alpena County, cut from lands in that county, and that the real subject matter of the suit is for trespass on lands and the conversion of logs taken by the alleged trespass on lands in that county, the defendants claiming to have cut them under a license from one of the plaintiffs, and that the whole subject matter including the alleged conversion arose in the county of Alpena, a duly organized county, having a Court, &c.

This allegation or statement is not denied by the plaintiffs in their counter affidavits, and must be taken to be established or admitted to be true.

The action is for trover to recover the value of logs and lumber. From the nature of the case as stated in the affidavit, it would appear necessary for the plaintiff to prove title to the lands, (it being wild or unoccupied land) to show ownership of the logs, but the ownership of the land is not disputed, and it can scarcely be said to be an action of trespass on the case for injuries to real estate. A suit in trover, waives or passes by the injury to the realty, and seeks to recover the value of the chattels severed and converted without regard to the injury to the land.

But it is claimed that it has been decided in some of the States, especially Pennsylvania, "that the right of property in a chattel that has become such by severance from the freehold, cannot be tried in a transitory action;" citing *Prwel vs. Smith*, 2 *Watts*, 127; *Brown vs. Caldwell*, 10th of *Sergeant & Rawle*, 114; *Mather vs. Trinity Church*, 3 *S. & R.*; *Baker vs. Howell*, 6 *Id.*

Upon a careful examination of these authorities it is manifest that they only apply to cases where the owner of real estate out of possession, seeks to recover from the adverse occupant the value of timber, coal, &c., cut or removed by the occupants claiming title, and in effect they only decide that the title to the realty cannot be tried in a transitory action against the actual occupant.—No case goes so far as to say that title to unoccupied lands cannot be shown in a transitory action for the purpose of showing the ownership of the property severed.

In this case the defendants base their claim upon a license from the plaintiff and so admit their title and ownership so far as appears by the papers submitted on this motion.

KRIEGER vs. WARNER.

In view of the whole case and its present situation in Court, I must decide against the motion to change the venue.

Motion overruled, &c.

KRIEGER vs. WARNER.

Replevin for a stock of groceries.—*Held*, That where the quantity, kind and location of the property to be replevied is given in the writ so that no other property than that claimed can be taken, the description is sufficiently particular to comply with the statute, and protect the rights of the defendant.

A return which shows the appraisement of goods replevied to have been made on oath administered by the officer, to make a true appraisement, sufficiently shows in what manner in this respect the officer executed the writ.

A declaration filed within ten days after the return day of the writ of replevin is in time.

A neglect to file the declaration in time is no ground for quashing a writ. Such neglect can only be taken advantage of by rule to declare and judgment of *non pros*.

Berrien Circuit, October, 1871.

Motion to quash writ of replevin.

Beaver, for motion.

Muzzy, opposed.

By the Court, BLACKMAN, J.—The plaintiff replevied a stock of groceries attached by the defendant as Sheriff.

The defendant now moves to quash, for three reasons :

1. Because of the insufficient description of the goods in the writ.

2. Because the goods were not appraised according to law.

3. Because the *Narr* was not filed until after the time prescribed, viz : on the return of the writ.

The several objections will be considered in their order. The statute, Chap. 152, nowhere prescribes the certainty with which the good replevied shall be described.

In § 5010, which gives a form for the writ, a blank is directed to be filled by "describing the goods and chattels to be replevied." In the absence of a statutory provision the Court must apply the common law rule, which requires certainty to a general extent, as

KENDON vs. WARNER.

expounded in 18 *Mich.*, 170. And the proper application of this rule must be controlled by the peculiar circumstances of the case.—Potter's store had been shut up by the Sheriff. Obviously no such thing as an inventory is possible. He has given as many limitations to the descriptions as were in his power, by confining service of the writ to all the groceries in the store occupied by Potter, on a certain lot in St. Joseph. The kind, quantity and location of goods are specified.

The defendant has taken inventory if he has executed the writ of attachment so that his rights are not periled. See on this point, *Grah. Pr.*, 733; *Petersdorff's Abr.*, 194.

The second objection does not appear to be founded on facts.—The counsel for defendant in pointing out the particular fact on which he relies, states that from the officer's return it does not appear the appraisement was made on oath. By § 5013, the officer must return the manner in which he executed the writ. It appears from the appraisement and return that all the statute required was done. The oath itself need not be returned.

The third and last objection is based upon a peculiar construction of § 5026, 5027, and decisions on statutes found in 2 *Wis.* 17; 4 *Id.*, 152; 1 *Hill*, (*Cal.*) 216. The writ may be returned before the return day. § 5018. On such return the Clerk shall enter an appearance for the defendant.

Counsel for defendant claim the next section, 5027, requires the plaintiff to declare "within the same time," leaving out of this connection the words, "as in personal actions."

On the counsel's own construction this default is only ground for a judgment of discontinuance. See *Grah. Pr.*, 732, for directions; or 1 *Burr Pr.*, 488.

The counsel for defendant has wholly misconstrued the statute which requires plaintiff to declare in the same time as in personal actions, which is, (*R.* 16,) twenty days after the return day. The *Narr* was filed ten days after.

The motion is therefore denied with costs.

MILLER vs. FINLEY et. al.

MILES B. MILLER vs. HUGH FINLEY, JR., AND HUGH FINLEY, SR.

Whenever it appears that the consideration of a paper between the original parties has been procured by fraud, proof of such fraud throws upon the holder the burden of proving that he got it in good faith, and gave value for it.

A *bona fide* holder of negotiable paper is one who acquires the paper in good faith, for a valuable consideration, from one capable of transferring the paper, without notice of the consideration or of attending facts and circumstances which would naturally lead an honest man, using ordinary caution to make further inquiries.

The rule is that an innocent purchaser of commercial paper takes it stripped of all equities between the original parties to it, but where the instrument is not the contract of the parties, where it is different from what they made it or intended to make it, it cannot be enforced in the hands of any one, unless indeed, the instrument in its changed form has been ratified by the parties so as to make it their contract.

Adding the name of another drawer or maker to a bill or note, is a material alteration, such as will discharge the original party not consenting thereto.

Where it was claimed that the payee named in a promissory note procured the signature of the maker while such maker was intoxicated, the intoxication being brought about by the payee named in the note, *Held*, That if the maker was so intoxicated as to be unconscious when he signed the note, such note would be void, even in the hands of a *bona fide* holder.

Kalamazoo Circuit, October, 1871.

May & Buck, Attorneys for Plaintiff.

J. W. Breese, Defendant's Attorney; *H. F. Severens*, of Counsel.

Charge of the Court, BROWN, J.—The plaintiff seeks to recover of the defendants upon a certain promissory note, in the words and figures following :

“ \$500.

Schoolcraft, August 26, 1868.

Twelve months after date, I promise to pay to the order of Frank A. Hutton, five hundred dollars, value received, with interest at ten per cent.

HUGH FINLEY, JR.

HUGH FINLEY, SR.”

The payee in this note endorsed the same to the plaintiff, who claims that he purchased the same in good faith and for a valuable consideration, before the same became due. The plaintiff then endorsed the note to Wm. B. Clark, who, he testifies, was to hold the same as collateral security for monies advanced by Clark to the plaintiff.

MILLER vs. FINLEY & al.

If the note was left with Wm. B. Clark only as security, and returned to the plaintiff before suit was brought, then the suit is properly brought by the plaintiff.

As a defence to this note, the defendants claim that the note, as to the younger Finley is void, because, it is alleged, after the note was made and delivered, the payee, without the consent of the maker, procured the signature of Hugh Finley, Sr., to the note.— Counsel for the defendants claim that if you find such to be the fact—if you find that after the note was fully executed and delivered, the payee procured the additional signature of Hugh Finley, Sr., without the consent of the maker of the note, then the change thus effected changes the note and makes it a different undertaking from the one to which he was a party.

Counsel for the defendants insist that the plaintiff should not recover against the elder Finley, because, they allege, that when he signed the note he was so intoxicated as to be unable, in point of fact to give his assent. They claim that he was so drunk that when his hand made the letters in proper order composing the name Hugh Finley, it was not guided by any intelligent will, and that therefore he should be discharged. It is admitted that the fact that the son's name is on the note does not invalidate it as to the father, and the liability of the father must be determined on other grounds.

On the part of the plaintiff it is insisted that if you should find the facts as claimed by the defendant, still he is entitled to recover. The plaintiff insists that he purchased the paper before maturity, in good faith for a valuable consideration.

The rule of law, briefly stated, is, that where a party is the *bona fide* holder of a negotiable instrument for a valuable consideration, without notice of facts which impeach its validity between the antecedent parties, if he takes it under an indorsement made before the same becomes due, he holds the title unaffected by these facts, and may recover thereon, although as between the antecedent parties the transaction may be without any validity."

Whenever it appears that the consideration of a paper between the original parties has been procured by fraud, proof of such fraud throws upon the holder the burden of proving that he got it in good faith, and gave value for it.

This is upon the theory that "if the note be proved to have

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been obtained by fraud, or affected by illegality, that affords a presumption that the person who has been guilty of the fraud would dispose of it and place it in the hands of another person to sue upon it," and hence the policy of the law requires the holder in such case to show that he holds the paper in good faith and for a valuable consideration.

When a note has been obtained and put in circulation fraudulently, the holder in order to show himself free from defendant's equities must prove that he became such holder in good faith for a fair and valuable consideration, in the usual course of business, without notice of any infirmity in the title thereof.

A *bona fide* holder of negotiable paper is one who acquires the paper in good faith, for a valuable consideration, from one capable of transferring the paper, without notice of the consideration or of attending facts and circumstances which would naturally lead an honest man, using ordinary caution, to make further inquiries.

Where however, a note is absolutely void, the transfer of it to an innocent party cannot make it valid.

If you find that the deed for which the note was given was worthless, this fact is no defence in this action, if the plaintiff bought the note before maturity, for a valuable consideration, in the usual course of trade and without notice or knowledge of a want of consideration between the parties to the note.

If you should find that the note in question was obtained of the defendants by fraud and imposition, this fact furnishes no defence in this action, if the plaintiff bought the note before maturity, for a valuable consideration, in the usual course of trade, and without knowledge or notice that the note was obtained fraudulently and by imposition, or of such facts as would naturally put an honest man on inquiry.

I also advise you whether the patent of which the right was sold to Finley, was or was not of a new or useful invention, is wholly immaterial in this case, and you have no right to consider that question in making up your verdict, if you find the plaintiff was a *bona fide* purchaser. The rule is that an innocent purchaser of commercial paper takes it stripped of all equities between the original parties to it, but where the instrument is not the contract of the parties, where it is different from what they made it or intended to

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make it, it cannot be enforced in the hands of any one, unless indeed, the instrument in its changed form has been ratified by the parties so as to make it their contract.

Adding the name of another drawer or maker to a bill or note, is a material alteration, such as will discharge the original party not consenting thereto.

If you believe from the evidence that after the note was made perfect, according to the intention of the parties, as the several note of the defendant, Hugh Finley, Jr., and after it had been completely issued and negotiated, the payee without the consent of Hugh Finley, Jr., caused it to be signed by Hugh Finley, Sr., as a joint and several maker along with such original maker, such original maker should be discharged from all liability thereon.

Upon this point I advise you as requested in plaintiff's 2d request, that the note is not void as to Hugh Finley, Jr., if he in any way assented to its being signed by Hugh Finley, Sr., either before or after it was so signed by Hugh Finley, Sr.

It is claimed as I have said, by the defendants, that the elder Finley was intoxicated when he signed his name. If you find from the evidence that the signature of Hugh Finley, Sr., was made while he was so intoxicated that he was unconscious of what he was about, and such intoxication was procured and brought about by the payee in the note, or any one acting in complicity with him, then you are instructed that such signature would not bind the said Hugh Finley, Sr., and he would not be liable on such note.

If Hugh Finley, Sr., at the time of signing his name to the note was sufficiently conscious to know that he was signing a promise or agreement of any kind, then the fact that he was under the influence of intoxicating liquors furnishes no defence to this action, though he would not have given the note if he had been sober.

In determining the question whether Hugh Finley, Sr., was in possession of his faculties to such an extent as to be able to make a valid contract, you are at liberty to inspect the note in controversy and the signature of Hugh Finley, Sr., thereto.

When you retire to your room you will enquire:

1. Whether the note was changed by the addition of the name of Hugh Finley, Sr., after it was executed and delivered by the maker to the payee, without the consent of the maker. If you so find,

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then Hugh Finley, Jr., was thereby discharged from liability on the note unless you find that he subsequently acquiesced in the charge.

2. To discharge Hugh Finley, Sr., from liability on the note, if you find the plaintiff purchased the same in good faith, for a valuable consideration, you must find that he was so far intoxicated as to be unconscious of what he was doing. A man will not be permitted to come into Court and defend against his own undertakings, merely because he was drunk or exhilarated under the influence of liquor. Such a precedent would be dangerous, and no man would be safe in purchasing commercial paper. The fact that a man gets drunk and makes a foolish bargain is no reason why he should repudiate his contract to the prejudice of persons acting in good faith.—It is contended that the signature of the defendant indicates that he had knowledge of what he was doing, but this is a question of fact for you and not for the Court to pass upon. If he signed the note, was he conscious? Say upon your oaths what are your honest convictions in the premises and act accordingly.

DWIGHT MAY, ATTORNEY GENERAL, *ex rel.* FISHER *et al.* vs. THE CITY OF DETROIT *et al.*

Where a city charter provides that certain public works shall be let to the lowest responsible bidder, with sureties, and that the same shall be advertised, *Held*, That the following provision in the advertisement for the work, by the Controller, viz: "Builders are required to file a satisfactory bond with the Controller before the proposals are opened conditioned that should they be found to be the lowest bidders they will enter into a contract, with good and sufficient sureties to perform the work," was warranted by the charter, and that a party bidding, though the lowest bidder, has no right to insist upon the acceptance of his bid without first filing a bidders' bond.

Wayne Circuit, October, 1871.

Levi T. Griffin, Solicitor for Complainant; G. V. N. Lathrop, of Counsel.

J. P. Whitman, Solicitor for Defendants; Theodore Romeyn and E. W. Meddaugh, of Counsel.

By the Court. PATCHIN J.—

This is a motion to dissolve a temporary injunction granted

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upon a bill in chancery filed for the purpose of obtaining a permanent injunction against the city of Detroit, restraining them from paying for certain paving upon Woodward avenue, in said city, that had already been contracted for with the defendants, Walton & Co., for the reason that the contract was illegal and void, not having been made in accordance with the provisions of the charter.

It is provided in the charter that all work of this kind shall be let to the lowest responsible bidder, with sureties, and that proposals for the same shall be advertised. The form of the advertisement, as well as the details of letting to the lowest responsible bidder, seems to have been left somewhat to the discretion of the parties who are required by the charter to perform that duty. The time, place and manner of presenting the proposals must be thus determined.

In the advertisement for proposals in the case at bar is the following provision: "Builders are required to file a satisfactory bond with the Controller before the proposals are opened, conditioned that should they be found to be the lowest bidders they will enter into a contract, with good and sufficient sureties to perform the work."

The Detroit Ironizing and Paving Company filed with the Controller sealed proposals, which are conceded to be the next lower proposals to those of Walton & Co., to whom the contract was let, but without complying with the above provisions by what is termed a bidder's bond, claiming that the Controller had no right to require them to do so. It is claimed on the part of the defendants that they neglected to thus comply with the conditions of the advertisement because the particular kind of pavement for which the bid was put in was secured by letters patent to other parties than themselves, to wit, the defendants, Walton & Co. It was conceded that in other cases, when the said Detroit Ironizing and Paving Company were the owners of the patent, they filed the necessary bidders' bond, and when the lowest bidders they were awarded the contract by the Common Council.

It therefore resolves itself into a question of right on the part of the Controller to require the bonds. It is conceded that up to 1869 these bidding bonds had not been required. In the proceed-

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ings of the Common Council of January 8th, 1869, will be found the following :

“ To the Honorable the Common Council :

GENTLEMEN—Mr. James French, who is the lowest bidder for paving, etc., of Farmer and Bates streets, declines to enter into a contract and perform the work. Messrs. Batchelder & Cook, who are the next lowest bidders for this paving, also decline to contract according to their proposals. Messrs. H. R. Johnson & Co., who are the next bidders for the paving, etc., of the above named streets, have agreed to perform the work at their proposal.

(Signed)

B. G. STIMSON, Controller.”

It will be seen from the above that instead of the lowest the highest bidder received the contract. It is entirely clear that up to this time those having the matter in charge had not so executed this provision of the charter, in this regard, as to secure to the city the very object of the law, namely that the contracts should be let to the lowest bidder, and that something more was necessary in order to properly carry out the very wholesome provisions of the charter in this respect. The additional requirement was therefore made that a bidders' bond should be filed.” “ The lowest *responsible* bidder” is the expression in the charter, and the Controller cannot under it contract with any other.

I cannot believe it to be the duty of the Controller to go out upon the street and make inquiry as to the responsibility of the holders or trust to his own previously acquired knowledge in regard to it. The charter does not provide the mode in which this information shall be obtained, and the Controller is therefore left to adopt such reasonable and proper regulations as will best carry out the objects of the law and secure the work done by the lowest *responsible* bidder, as contemplated by the charter. This, it seems to me, the Controller has most effectually done by requiring bidders' bonds to be filed with the proposals, that he may in his own office (where it is presumed his duties are to be performed) determine all the matters required of him by the law. And the public record thus made will for all time to come give notice to the world that no man's bid was ever acted upon, much less accepted, which did not possess all the qualifications required by the law.

YORE, vs THE PEOPLE

YORE, Plaintiff in Error, vs. THE PEOPLE, Defendant in Error.

A person arrested without warrant by the Marshal of the village of Benton Harbor must be taken before a Justice of the Peace of Benton township, and this must appear on the face of the proceedings.

A Justice cannot hear, try and determine a criminal charge upon a complaint alone.

A defendant in a criminal case cannot challenge peremptorily jurors in a Justice's Court.

Berrien Circuit, October, 1871.

Certiorari to Justice's Court.

C. B. Potter, for Plaintiff.

G. S. Clapp, for Defendant.

By the Court, BLACKMAN, J.—Burr, as Marshal of the village of Benton Harbor, made on oath a complaint to Justice Hull, which was reduced to writing and subscribed by him, charging Yore with sundry violations of the ordinances of the village, in being disorderly.

The papers nowhere show of what township said Hull was a Justice. No warrant was issued.

After making the complaint Burr introduced the defendant Yore to the Justice, who distinctly read the complaint to Yore and required him to plead thereto. Yore plead not guilty and demanded a jury trial.

On the coming in of the six jurors summoned, Yore's attorney challenged two of them peremptorily. The Justice overruled the challenges.

By Act No. 428, *Laws of 1869*, Art. 8, § 2, Justices of the Peace of the township of Benton are authorized to hear, try and determine cases of disorderly persons arrested without warrant, and before complaint, and kept in custody.

The Justice undertook to proceed under Chap. 118, while the Section 2, of Art. 8, under which Yore was arrested, plainly contemplates proceedings under Chap. 112. By both chapters there could be no trial without a warrant, for it is on its return

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the Justice is authorized to hear, try and determine the cause. § § 1551, 3926.

It is the charge in the warrant that is distinctly read to the defendant, and to which he is required to plead. § 3928. The sole use of the complaint is to authorize the issue of the warrant, while the warrant serves a two-fold purpose, viz: to cause arrest and to furnish pleadings. *Pratt vs. Bogardus*, 49 *Bar.*, 93; 10 *Mich.*, 185; 9 *Id.*, 193.

As the trial of a disorderly person arrested without warrant must be by a particular magistrate, this must appear on the face of the proceedings.

The name and style of the Justice must be set forth in the complaint. *Tiff. Cr. L.*, (*Howell*), p. 134.

The peremptory challenge is not a common law right of a person charged with a misdemeanor. 4 *Bl. Com.*, 333. It is given by § § 4400, 6070, only to persons indicted.

§ 3934, of Ch. 118 provides for challenges upon legal objections and no other. *Expressio unius est exclusio alterius*. *Tiff. Cr. L.*, 154.

DAVID B. CHEESEMAN, *Plaintiff in Error*, vs. THE PEOPLE, *Defendants in Error*.

C was convicted, before a Justice of the Peace, of assault and battery, and sentenced to pay a fine of five dollars and costs within five days, and in default thereof to be imprisoned ten days in the common jail. *Held*, That the judgment should be reversed, the sentence being uncertain and conditional.

Van Buren Circuit, September, 1871.

Certiorari to Justice's Court.

The plaintiff in error was tried by a jury and convicted before a Justice of the Peace, of assault and battery, and judgment was rendered against him that he pay a fine of five dollars and costs of suit, taxed at \$24 83, and in default in the payment of said fine and costs within five days, that he be confined in the county jail for the term of ten days

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By the Court, BROWN, J.—Of the several grounds of error alleged in this case, I deem it necessary to consider none but the first, as that is decisive. One of the elements of a sentence is that it be final and conclusive. The judgment pronounced by the Court is the sentence or conclusion of the law following upon ascertained premises, and must therefore be unconditional. In this case the sentence is uncertain, and the respondent's imprisonment is to depend upon a condition precedent—the payment or non-payment of the fine and costs within a certain number of days. To determine whether the fine and costs were paid within the time limited, would require another adjudication; a second judgment.

A sentence must be something more than a *judgment nisi*.

Had the judgment of the Justice been that the respondent pay a fine of five dollars with costs taxed at \$24 83, and that he be committed to the county jail until the same should be paid, not exceeding ten days, I have no doubt but that such a judgment would be valid—at least it would not be invalid on the score of uncertainty. The sentence would be certain and definite; the imprisonment in such a case is designed to secure the payment of the fine and costs and not to be in lieu thereof. See *State vs. Bennett*, 4 D. v. & Batt., 43; *Matter of Sherman*, 1 Cow., 144.

The judgment of the Court below must be reversed.

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A defendant sued here in assumpsit on a judgment rendered in Ohio on a cognovit may prove, under the plea of the general issue, any defence which in that State would be a good ground for setting aside the judgment, or an order to deliver up the cognovit to be cancelled.

Berrien Circuit, October, 1871.

Clapp, for Plaintiff.

Ormsbee & Muzzy, for Defendant Whittlesey.

Assumpsit on a foreign judgment.

By the Court, BLACKMAN, J.—The plaintiff sued the defend

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ants in assumpsit on a judgment of the Court of Common Pleas of Portage County Ohio.

To this, defendant Whittlesey who was the defendant served with process, pleaded the general issue.

By adopting this form of action the plaintiff subjected his case to all the rules of law relating to pleading and evidence in assumpsit. The judgment counted on creates the liability, which forms the consideration of the promise. 1 *Sanders on Pl. & Ev.*, 113.

Our statute, § 4550, does not in express terms make any change in the rules of pleading. *Gosling vs. Hingston*, 20 *Mich.*, 440.

The judgment counted on, when in evidence, proves all the allegations the plaintiff is bound to make out by proof in order to recover.

The effect of our statutory plea of the general issue is to require the plaintiff to prove all of his allegations which entitle him to a recovery according to the form of action he has adopted. 9 *Mich.*, 375.

Under his plea the defendant may prove without notice in this action a want of consideration. In short he may disprove every allegation the plaintiff must prove. 1 *San. Pl. & Ev.*, 138; 2 *Id.*, 720.

The judgment when introduced in evidence is as conclusive as when pleaded as an estoppel or counted on. 1 *Green. Ev.*, § 531. And this is so because of the intrinsic force of the judgment as a *res adjudicata*.

This conclusiveness depends on the nature of the record and on the tribunal. *Elliott vs. Green*, 10 *Mich.*, 116.

It has no higher dignity here than in the State of Ohio, and if inquirable into there it will be open to investigation here to the same extent, according to our rules of practice. *Wood vs. Watkinson*, 17 *Conn.*, 505, 508, 510; *Bowstee vs. Todd*, 9 *Mich.*, 376.

It is always competent to inquire into the jurisdiction of the Court, and if it is acquired by fraud the judgment is void. *Vose vs. Morton*, 4 *Cush.*, 27; *Bank of U. S. vs. Moss*, 6 *How.*, 39.

From the record in this case it appears that this court was one of general jurisdiction; that the cause of action was a money bond signed by both defendants, a *copromitt actionem* in the usual form, both dated June 3, 1860; that the suit was begun by process No-

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vember 9, 1867, by filing a petition and *præcipe*, which process was returnable November 18th, 1867, and was indorsed with a notice that in case the defendants did not appear by December 7, 1867, judgment would be taken for \$462 32, and was served on Chittenden December 12th, but not on Whittlesey, who had resided in this State since 1863, and was returned; that on the same day plaintiff took judgment by confession for \$502 80 and costs, under the *cognovit*, and that this plea confessed the truth of the petition filed as commencement of suit by process.

The Court must presume in absence of proof to the contrary that the principles of the common law prevail in Ohio. That therefore it may look at the record for the purpose of determining the judgment. 20 *Mich.*, 440; cases cited in note 4, to sec. 541 of 1 *Gr. Ev.*

The defendant may disprove the jurisdiction. *Shumway vs Stillman*, 6 *Wend.*, 447.

While from the nature of the case the defendants can not dispute the judgment by plea and evidence directly, the plaintiff must strictly pursue his power of attorney, and the defendants may attack it by motion and a trial of a feigned issue. See 5 *Hill*, 497; 9 *John*. 79.

The judgment being subject to revision in the State where rendered is subject to revision here, but as the record is not of this court, the defence which might in Ohio have been tried on a feigned issue, may be here tried in a suit brought on the judgment.

For the conclusiveness of a judgment depends on the fact that it was rendered on a trial of the merits where the defendant had an opportunity to litigate. The court could obtain no jurisdiction over the person by the use of a void power of attorney nor by the braudulent use by the plaintiff of a valid one; nor where the power is not strictly pursued. *Gr Practice*.

For these reasons, the defendant W. was allowed to prove that plaintiff on payment to him of two per cent. additional interest over the lawful rate by defendant Chittenden, extended the time of payment without W's knowledge or consent from year to year till June 1867; that in the spring of 1867, C. became insolvent and went into bankruptcy and that W. was security on the bond for C., said plaintiff well knowing the same.

This is a defence to the action on the bond here, and in Ohio would support a motion to set aside the judgment. 1 *San Pl. & Ev* 527.

SUPPLEMENT.

Abstracts of Decisions of the Supreme Court, rendered at the October Term, 1870.

[Equity cases, involving only questions of fact, will not be published in these reports.]

ADAMS vs. CHURCH.

Interlocutory order—no appeal from.

Error to Calhoun Circuit.

CAMPBELL, C. J.—The writ of error was brought on an order discharging a *capias*. The writ was issued December 9, 1869, returnable on the first Monday of March, 1870, and the defendant was arrested on it immediately. March 19, 1870, defendant, by his attorney, moved to set aside and dismiss the writ, to set aside the order to hold to bail and that the defendant be discharged from arrest. March 21, on motion of defendant, proceedings were stayed for two weeks. July 11, 1870, plaintiff declared. July 18, the Court ordered that the *capias* be discharged, the order to hold to bail be set aside, and defendant be discharged from arrest, on condition that he should stipulate not to bring suit for his arrest. The next day he filed such a stipulation and no further proceedings appeared.

The order of the Court was an interlocutory order and not a judgment. It cannot therefore be brought to the Supreme Court on a writ of error and the case must be dismissed for want of jurisdiction.

BAY CITY AND E. S. R. R. Co. vs. AUSTIN.

THE BAY CITY AND E. S. R. R. Co. vs. AUSTIN.

The law imposes the duty of maintaining a fence, upon the owners and occupants of a railroad respectively, as well as upon the company first organized, and without confining it to either.

A law providing for the recovery of double damages, was repealed after the rendition of a verdict, but before the entry of judgment thereon. *Held*, in such case that judgment should be for single damages only.

Error to Saginaw Circuit.

Opinion by GRAYES, J.—Aug. 12, 1868, a horse belonging to Austin was run over and killed by an engine of the Flint & Pere Marquette Company, on the road of the plaintiffs in error and this suit was brought to recover for the injury. June 22, 1869, a verdict was given in his favor for \$212 04, and Oct. 9, thereafter the Court awarded judgment for double that sum.—While the plaintiffs in error owned the road, the other company finished it and exclusively operated it, and the horse was killed by their engine while using the road under a contract.

By the statute as amended, *S. L.*, 1867, p. 221, railroad corporations and persons owning or occupying any railroad in this State, are required to keep up fences, cattle guards, farm crossings, &c.; and the corporations, persons and agents who may occasion injury to animals where such fences, &c., have not been erected, on the line of such roads, are made liable in double damages. And after such fences, &c., are built, persons leading or driving animals on such road at other places than at farm crossings, are liable to a penalty not exceeding ten dollars.

Plaintiffs in error objected to the recovery, on the ground that under the law, as amended, they could not be held liable, because the Flint & Pere Marquette Company were not their agents within the meaning of the statute.

This claim of the plaintiffs in error is not sustained.

The amendment of 1867 intended to impose the duty of maintaining a fence, upon the owners and occupants of a railroad respectively, as well as upon the company first organized, and

ZIEGENFUSS v. ZIEGENFUSS.

without confining it to either. The plaintiff in error might be liable as principal, and the Flint & Pere Marquette Company as an agent.

The act of 1869, which was passed before the verdict and became operative after it, but before judgment, struck from the amended section 43 the word "double," leaving a liability for single instead of double damages, and the plaintiffs in error insist that this amendment cut off all right to a judgment for more than single damages. They claim that the act of 1867, in allowing more than single damages, was exclusively punitive, and vested no right in the defendant in error, which the Legislature before judgment could not take away. On the other hand it was argued that the law as it stood when the injury was done fixed the measure of his right, and that the moment the damage was done he acquired an inviolable right to recover not merely all his damages but double the amount, and that it is not to be supposed that the Legislature intended by the repealing act of 1869 to affect the measure of redress in a pending action.

Held, That the act of 1869 was an unqualified repeal of the phrase introduced by the act of 1867, giving double damages, and that there was no ground for holding that the Legislature meant to except pending cases from its operation. The plaintiff below had no such vested right to the double damages as was superior to the power of the Legislature to take away and to the extent of the matter of damages the judgment below was reversed and a new rule of damages fixed. On the other questions, judgment was affirmed.

ZIEGENFUSS vs. ZIEGENFUSS.

Bill for divorce. Motion for alimony.

The Court refused the motion for alimony on the following grounds: Because it did not appear from the affidavits of counsel that the appeal was prosecuted in good faith; because it appeared that the defendant was poor, and that the complainant had wealthy relatives who were willing to provide for her.

RYAN *et. al.* v. ANDREWS.

RYAN *et. al.*, vs. ANDREWS.

roperty descending to a decedent from his father, passes to his maternal grandmother, where she is nearest of kin to decedent, though she was not related, by blood to the father.

Error to Clinton Circuit.

Opinion by CAMPBELL, C. J.—The case presents the single question whether property which descended to a decedent from his father, passes to his maternal grandmother, who was not related his father, or to more distant relatives who were so related, in exclusion of her claims as next of kin. The whole matter depends upon the construction to be given to § 3816. *C. L.* which reads as follows: "The degrees of kindred shall be computed according to the rules of the civil law; and kindred of the half blood shall inherit equally with those of the whole blood in the same degree, unless the inheritance came to intestate by descent, devise or gift of some one of his ancestors, in which case all who are not of the blood of such ancestor shall be excluded from such inheritance."

Held, that under this section the estate can never go to any one else but the nearest of kin according to the degrees of the civil law. If there is but a single next relative, he or she will take the whole estate without reference to whether the kindred is on the side of one parent or the other. If there are several next kin and they are notable relatives on the same side, then only such of them will take as are of the blood of the ancestor from whom the estate was derived. In the present case, as there is no one else of the same degree of kindred with the maternal grandmother and she is nearest of kin, the estate devolved solely upon her, and the remoter kindred are excluded.

Judgment below affirmed with costs

ALLEN *vs.* ATKINSON.—*PEOPLE v. THE PEOPLE.*

ALLEN *vs.* ATKINSON.

Error to St. Clair Circuit.

Opinion by COOLEY, J.—In this country, where titles are recorded, when a contract to convey land is silent concerning the title, it is to be assumed that the title is good, and it devolves upon the vendee, if he questions it, to show the defect. But the vendee has an undoubted right to a good title and to a deed with proper covenants, and to insist that his title should be a marketable one. In this case when Atkinson showed a defect upon the record, the most that the vendor could insist upon was that he should satisfy himself within a reasonable time whether the apparent incumbrance was a valid one or not.

Judgment affirmed.

PARKER *vs.* THE PEOPLE.

The statute (S. L. 1861, p. 158) providing for a penalty for encroachments upon highways has reference only to such highways as are "laid out," and not to those that exist by prescription.

GRAVES, J.—Parker was sued before a Justice for the penalty of 50 cents per day given by the act of March 11, 1861, for an alleged encroachment by fence, upon a highway, and the defendant in error obtained judgment, and Parker appealed. On the trial in the Circuit, where the People again obtained judgment, certain exceptions were taken, which were carried to the Supreme Court.

Held, That as the penalty sued for is only given for encroachment upon such highways as are "laid out," the evidence of user admitted on the trial to prove the existence of the way was immaterial and not pertinent to the issue.

The survey bill and order made by the commissioners, and which the court allowed to be given in evidence, did not show

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the *laying out of a highway*. They were made under the statute which requires the commissioners to ascertain, describe and enter of record such roads as become highways by public use for the requisite length of time.

This statute assumes the existence of ways by prescription which ought to be described in the town records, and does not contemplate the making of new ways. The survey and order in question were, therefore, inadmissible as evidences of the laying out of a highway; or of the existence of a highway laid out by commissioners.

Judgment reversed.

 PARSONS vs. THE PEOPLE.

In criminal proceedings against A., on complaint of B., for adultery with B.'s wife, B.'s wife is a competent witness.

Error to Branch Circuit.

Opinion by CAMPBELL, C. J.—Plaintiff in error, having been convicted of adultery, alleges as error that the wife of the complainant was allowed to give testimony against him. He relies on the latter clause of § 4342, *C. L.*, amended in the Laws of 1861, p. 169, and the Laws of 1869, p. 150, which declares that “in any action or proceedings, instituted by the husband or wife, in consequence of adultery, the husband and wife shall not be competent to testify.” In connection with this he refers to § 5858, which provides that “no prosecution for adultery shall be commenced but on the complaint of the husband or wife.”

The old law forbidding husband and wife to testify for and against each other, in most cases, was reviewed, but it was shown that in bastardy cases there is now no legal impediment to the wife's proof that she has been guilty of adultery. And in 4 *Edw. Ch. R.*, 621, a husband was allowed in a case, where the wife of another had sued her husband for adultery, to prove the act to have been done with the wife of the witness. The weight of authority clearly admits such testimony when the husband and wife are not parties.

DELASHMAN *et. al.* v. BERRY, Ex'r, &c.

Held, That the present case would come within the decisions referred to, and that the statute has not established any rule of evidence which would prevent the admission of the testimony. The remaining question to be determined was whether the proceeding by criminal process against the adulterer was a proceeding instituted by the husband within the meaning of the statute. *Held*, that it was not, but that the words of the statute relating to this matter were to be confined to civil proceedings.

Judgment of the Court below affirmed.

DELASHMAN *et. al.* vs. BERRY, Ex'r, &c.

Where a bond is given by a defendant, under the forcible entry and detainer act, to appeal the suit to the Circuit Court, conditioned to pay accrued rent and costs, upon appellee obtaining restitution of the premises, a right of action upon the bond does not accrue until actual restitution and possession has been obtained.

The facts to be presumed after verdict depend upon the issue made by the pleadings.

Error to Branch Circuit.

Opinion by CHRISTIANCY, J.—A Circuit Court Commissioner rendered judgment against Delashman giving restitution of certain premises, and costs. Delashman appealed to the Circuit Court, giving bond conditioned to pay the rent up to the time the appellee should obtain restitution of the premises, together with costs. Suit was brought upon the bond. The only breach assigned was, that on the fourth day of April, 1868, such proceedings were had on the appeal in the Circuit Court that by the consideration of the Court it was ordered, amongst other things, that the complainant have restitution of the premises, and recover against Delashman his costs and charges and have execution therefor. Of all which the said defendant is charged to have had notice. And it was further charged that Delashman did not forthwith pay the rent due or to become due to the complainant, up to the time when the complainant obtained restitution of the premises, together with his costs, etc., wherefore he claimed damages.

It will be seen that the declaration does not allege that any rent

DELAHAY *et al.* v. BERRY, &c.

became due or that the complainant obtained possession of the premises.

Held, That no right of action accrued until actual restitution and possession had been obtained. The judgment might be taken to the Supreme Court and reversed, in which case there would be no breach in the bond. Such restitution not having been obtained, the declaration shows no cause of action.

It was, however, insisted by defendant in error that this declaration would be good after verdict, on the ground that all the facts were proved on the trial which were necessary to support the action. The rule of the common law is not so broad as this; the statute was intended to adopt the common law rule. The facts to be presumed after verdict depend upon the issue made by the pleadings. If a declaration in assumpsit does not in any way allege a consideration, but the issue is upon a *nudum pactum*, no consideration will be presumed, because none appears to have been claimed to exist, and the verdict will not cure this defect. But if it charges any facts from which it appears that the plaintiff claimed any consideration, if the defendant does not demur but goes to trial upon the facts, a verdict against him will cure the defects in the declaration.

In the present case the pleader did not intend to base his rights upon the existence of the facts deemed by the Court necessary to sustain his action, and the Court could not infer the existence of facts which it is clear the declaration did not even imply. Had the declaration in other respects been good, the Court might have assumed that certain rent was due from the argumentative way in which that fact was stated in the declaration.

Judgment reversed with costs, but no new trial ordered, as no cause of action appeared. As amendments to the declaration might be permitted in the discretion of the Court below, the cause is remanded to that Court for such further proceedings as might be there taken.

HALL v. THE PEOPLE.

HALL vs. THE PEOPLE.

Where, in proceedings against a person for usurping the office of School Moderator it appeared affirmatively that such person has been elected to the office, and it is sought to show his removal by the Board, *Held* that the records of proceedings of such Board are not competent evidence without showing the official character of the Board or its members.

The complaint for the removal of a party from the office of Moderator referred to him as "of District No. two," while elsewhere through the proceedings the District is described as District No. 1. The information charged the accused with having taken upon himself to act as Moderator of District No. "one." *Held*, that since the proceedings for his removal indicate no other charge than that of falsely taking upon himself to act as Moderator of District No. 2, it must be assumed that it was on that charge that the Board proceeded to trial and judgment.

It is error to permit that to be shown by parol which the law requires to be perpetuated and shown by writing.

The statute authorizing a criminal prosecution for falsely taking upon one's self to act in an official character or capacity, was not intended to apply to a case where a party, in good faith and during a controversy as to his title, continued to act in the office to which he had been chosen.

Error to Calhoun Circuit.

Opinion by GRAVES, J.—Hall was charged with having falsely taken upon himself to act as Moderator of School District No. 1. of the township of Sheridan, and was convicted below. On the trial, the Prosecuting Attorney, having given evidence tending to show that Hall had been Moderator of the district, and that a movement was made to remove him from the office, sought to prove that the Township Board removed him, and that he thereafter assumed to act as though still in office. To show the removal, certain writings, purporting to be the record of the proceedings of the Board in the case were offered in evidence. Objection was made and the evidence was admitted.

Held, That as the Prosecuting Attorney had already submitted evidence tending to show that Hall had been made Moderator for a term covering the time when the acts of usurpation were alleged to have occurred, it was necessary to show that his official life had been legally cut off before these acts were done. These writings were relevant, but were not competent without proof of the official character of the Board or of its members. No evidence was given of such official character unless certain recitals in the papers themselves are

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to be considered. These writings could not be the medium of proof of a fact upon which their very validity depends. The admission of the papers was improper.

The complaint for Hall's removal was in the following terms:—
"Complaint against Harry B. Hall, of District No. *two*, for illegal use of public money," while elsewhere through the proceedings the district is described as number "*one*." The information charged Hall with taking upon himself to act as Moderator of District No. "*one*."

Held, That since the proceedings for Hall's removal indicate no other charge against him than that of falsely taking upon himself to act as Moderator of District No. 2, it must be assumed that it was on that charge that the Board proceeded to trial and judgment. If such was the fact it was a fatal error in the proceedings—upon a charge against him as Moderator in one district he could not be tried as a delinquent officer in another, and convicted and ousted from office in the latter.

The Prosecuting Attorney, against objection, showed by a witness that the complaint as made, described Hall as Moderator of District No. 1.

Held, That this was erroneous, as an attempt to prove by parol a fact which was required to be perpetuated and shown by writing.

It was claimed that Hall was shown to have admitted his removal in a notice drawn by him in his assumed capacity of Moderator for a special meeting.

Held, That this notice, standing by itself, if it tended to prove anything, tended more strongly to prove that in fact, he continued in office than that he had been turned out.

Held, further, That the statute authorizing a criminal prosecution for falsely taking upon one's self to act in an official character or capacity was not intended to apply to a case where a party, in good faith and during a real controversy as to his title, continued to act in the office to which he had been chosen. The theory of the Judge's charge to the jury was erroneous in this regard and tended to mislead.

The judgment below reversed and new trial ordered.

THOMAS v. HOFFMAN.

THOMAS vs. HOFFMAN.

In an action of trespass against several defendants, where verdict was rendered against all, on a motion for new trial on the ground that the verdict as against three of the defendants was erroneous, the Court below permitted the plaintiff to discontinue as to the three and rendered judgment for costs in their favor. New trial denied. *Held*, that the discontinuance was proper.

Error to Lapeer Circuit.

Opinion by COOLEY, J.—The only question in this case related to the correctness of the Court in permitting a discontinuance as to three of the plaintiffs in error, after verdict against all three and judgment against the others, without a new trial. The action was trespass against fourteen defendants, and a verdict rendered against all. The same journal entry which records the verdict includes also a judgment upon the verdict against all; but this was probably an inadvertence of the Clerk, as on the same day twenty days were allowed the defendants in which to move for a new trial. The motion was argued October 21, 1869, and the Court made an order that, it appearing that the verdict rendered against three of the defendants was contrary to the evidence, there being no sufficient evidence to show that they were guilty of the trespasses complained of, and the verdict being contrary to the charge of the Court, a new trial was ordered, unless the plaintiff within one day elects to discontinue as against the said three defendants, and agrees to an entry of judgment for costs in their favor. The next day, attention having apparently been called to the fact that judgment had been entered upon the verdict, a new judgment was entered in favor of the three as to whom suit had been discontinued, and against the other eleven.—The defendants then brought error.

The ground taken was, that after a cause had been submitted to a jury, and they have by their verdict assessed joint damages against all the defendants, the plaintiff cannot discontinue as to one or more of the defendants and retain his verdict or judgment against the others. It was conceded that, as all torts are joint and several, the plaintiff, who has joined several as wrong doers in one action, may discontinue as to any of them before verdict, and that the authori-

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ties sanction a discontinuance, after verdict, as to any defendant who, by reason of any rule of law, could not properly have been joined, and also as to any defendant against whom damages have been severally assessed; but it was claimed that the authorities do not go further.

The discontinuance in this case was correct, and the judgment below was confirmed with costs. For the ratification of any injustice which might accrue to a part of the defendants through any estimate placed by the jury upon the conduct of the defendants as to whom a discontinuance was entered, the Judge of the Circuit must be appealed to.

KILGORE vs. HASCALL, Administrator.

Error to Kalamazoo Circuit.

Opinion by CAMPBELL, Ch J.—Plaintiff brought suit against defendant's intestate, Caroline A. Hascall, for flowing certain of his lands by means of a dam on a parcel of land further down the stream. The defence justified, under a deed from Kilgore, which was claimed to authorize the flowage. Kilgore owned a tract of land west of the Kalamazoo and Three Rivers Plank Road. A stream called Portage Creek, ran northerly through these lands, and a branch called the Little Portage, flowed easterly through the same tract, and joined Portage Creek on the premises and near the plank road. In March, Kilgore conveyed to Deborah B. Allcott, a mill site and water privilege on the Little Portage, and also the same right and privilege to erect a dam at or below the entrance of the Small Portage and carry the water by a race, &c. The dam which caused the flowage complained of, was built on the Big Portage, considerably further down stream than Kilgore's north line, and set the water back, but not beyond or up to the north bank of the Little Portage, and there was no race or other work connected with it built on Kilgore's land—Plaintiff claimed that there was no right to flow his land unless the dam and races were also built upon it.

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Held, That the ruling of the Court below that the deed authorized the flowing, if necessary, was correct. The conveyance was intended to grant a water power to which the race and dam were mere incidents, and the grantee was not compelled to use all the privilege granted unless she chose, but might erect the dam on her own premises. In effect the plaintiff makes complaint that he has not been damaged as much as he might have been by the flowing, which he had authorized by deed.

Judgment of the Court below affirmed with costs.

HINCHMAN vs. BARNES.

Newspaper—where published.

Error to Wayne Circuit.

Opinion by COOLEY, J.—The principal question concerns the meaning of the statute which requires “notices of special partnerships to be published in two newspapers in the Senatorial District within which the business is to be carried on” and makes the special partner liable as a general partner if there shall be any failure to make the requisite publication. The business in this case was to be carried on in the First Ward of the City of Detroit, and the notice was published in two newspapers, the offices of which were in the Second Ward of the city, and in a different Senatorial District from that embracing the First Ward.

Within the meaning of the statute the city, village or township where a paper is issued is the place of publication, one part of it just as much as another, and the statute does not design to take notice of inferior sub-divisions, or to inquire at all into the question whether the proprietors printed their own paper or hired another person to do it, or how the papers were distributed. In this case therefore the notice as published was sufficient.

 CLEE v. SEAMAN.

CLEE vs. SEAMAN.

- 1 As a rule, defendant in ejectment is at liberty to controvert plaintiff's title.
2. Where a party went into possession of land under a contract of sale to him to convey "the right title and interest then held by him" (vendor) - of in and to said land," not stating what such interest was or was claimed to be, and also a clause allowing vendee to go into possession: *Held*, that the last provision was a mere quit claim of any possessory right plaintiff might have, and on condition that he should turn out to have such possession or right. *Held* farther, that defendant was not estopped from denying plaintiff's title, having obtained possession of the land on the faith of the contract: and continuing in possession, is not estopped from denying any right or title of plaintiff, expressly or by fair implication, asserted or claimed by him in the contract.
3. If the vendor had no possession, actual or constructive, there can be no estoppel.

Error to Wayne Circuit.

Opinion by CHRISTIANCY, J.—As a rule the defendant in ejectment is at liberty to controvert the plaintiff's title. If plaintiff claims that defendant is estopped to deny his title, he must show the facts constituting the estoppel. This, plaintiff undertook to do, by the introduction of the contract with Guilfoil, with certain evidence tending, as he claims, to show that Guilfoil went into possession under it, and that defendant claimed the premises through Guilfoil by a deed from his widow and heirs. It is not claimed that Guilfoil would be estopped by the plaintiff alone from denying plaintiff's title. If estopped at all, it is by having obtained from the plaintiff the possession of the land by means or on the faith of the contract, or by having placed himself in a position which estops him from denying that he thus obtained the possession. If he did thus obtain it, he would never have been estopped while he continued in possession from denying any right or title of the plaintiff, expressly or by fair implication asserted, or perhaps claimed by him in the contract. The ground of the estoppel is that the vendor gives up the possession to the vendee, and the latter obtains it on the faith of the contract, and it would be a violation of good faith, and a fraud on the vendor to allow the vendee, while he remains in possession, to deny such right or title of the vendor. If he proposes so to do, he must first restore possession to the vendor, and place him in *statu quo*.

It is the possession from the vendor upon the faith of the con-

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tract that creates the estoppel, if it exists; and if the vendor have no possession actual or constructive, it would seem to follow that he could not transfer it, and that, this fact appearing, there would be no estoppel. As the vendee, however, may estop himself from denying the title, so he may doubtless under some circumstances, estop himself from denying the possession or right of possession of the vendor, and the fact of having obtained it from him.

When the vendor, as in this case, does not by his own contract set forth, allude to, or undertake to convey any particular estate, but merely agrees to *quit claim such right as he may at the date of the contract have in the premises*, the most that he can be said to assert is that he claims to have some right, which, if he has it, is susceptible of being transferred or conveyed by such quit claim.

And, as the vendee cannot be held conclusively to admit any other or greater title in the vendor than by his contract he appears to have claimed, it is difficult to see any ground upon which the vendee, though going into possession, can be estopped from denying any particular title or interest which the vendor may set up on the trial, since no claim to any one of these was asserted or therefore admitted by the contract. And though each should be disproved, or the vendee should prove any title in himself, less than a full and perfect title to the whole, this does not show that the vendor did not have some other interest or right, or all that by the contract he claimed to have and the vendee is at most only estopped from denying that he had none at all. Besides the want of mutuality, there is no such certainty as is required to sustain an estoppel.

But to estop the defendant from damaging the title of the plaintiff in any form or to any extent in the present case, it was incumbent on the plaintiff to show that Guilfoil obtained the possession from the plaintiff under the contract. To do this he must show that he had the possession or the right of possession before the contract and that he transferred it the defendant and give him the possession; or that the defendant, under the circumstances, is estopped to deny his possessory right.

It was held that the testimony did not tend to show this. The plaintiff gave evidence, however, tending to show that Guilfoil, after the date of the contract, went into the possession, claiming under it. And to determine whether the possession thus taken estopped him

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from denying the plaintiff's possession or right of possession, the Court had to consider the possession with reference to the provisions of the contract. The substance of the contract was that, upon the payment of \$80 and interest by Guilfoil at certain times, plaintiff agreed to sell and convey to Guilfoil—not the land mentioned in the contract—but only “the right, title and interest then held by him of, in and to the said land, not stating what such interest was or was claimed to be.” Plaintiff further agreed that Guilfoil might immediately enter on the land and remain thereon and cultivate the same as long as he should perform the agreement on his part and no longer.

Held, That it was quite clear that the provision allowing Guilfoil to go into possession was intended to be co-extensive only with that in respect to the consequence of the title, a mere quit claim of the title, a mere quit claim of any right of possession the plaintiff might have, and on condition that he should turn out to have such possession or right.

There is therefore nothing in the provisions of the plaintiff's agreement amounting to an assertion of possession or right of possession on the transfer of either to Guilfoil without some evidence that he had such right to transfer, and nothing therefore to estop him from denying the right of possession to the plaintiff.

Held, further, that no stipulation on the part of Guilfoil amounted to an estoppel on the question of possession. It is clear from the language of Guilfoil's covenant, that it refers to and was intended to provide only for the statute remedy for summary proceedings, by which landlords are authorized to receive possession of lands held over by tenants. The covenant relates to an action of that nature, and does not apply to an action of ejectment.

The charge of the Court below was erroneous; the judgment must be reversed with costs and a new trial ordered.

SUPPLEMENT.

Abstracts of Decisions of the Supreme Court, rendered at the October Term, 1870.

HENRY HAMMOND vs. CATHARINE HARRISON.

Error to Van Buren Circuit.

Opinion by COOLEY, J.—September 10, 1864, Hammond contracted to sell to Harrison an 80 acre lot in Van Buren Co., for \$500—viz: \$120 down, and balance in subsequent instalments. The contract was in writing and was signed and sealed on behalf of Mrs. Harrison by her husband, who had oral authority for the purpose. Harrison took possession, and cut and sold considerable timber, paid taxes for two years and gave contracts to two persons for the sale of parcels of the premises.—The legal title at the time the contract was entered into was in one Gordon, an insane person, of whom one Mickle was committee. T. W. Mizner acting as agent of Mickle, sold the land to Hammond who purchased in good faith and in the belief that he was to obtain a good title. The conveyance however was not yet made. Harrison paid Hammond the whole purchase price except \$103, and on September 14, 1866, tendered payment of this sum and demanded title, but Hammond having then discovered that Mickle had no authority as committee to make sale of lands in Michigan, declined on this ground to execute a deed, and Harrison then brought action for damages for breach of his contract to convey.

The defendant objected to oral proofs of the authority to plaintiff's husband to sign the contract, and the objection was overruled.

Held, that it was not essential that the contract should be

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under seal, and an oral ratification of it afterwards was sufficient, and the subsequent ratification was so abundantly proved in this case that the error, if such it was, proved immaterial and the judgment will not be reversed for an error that was not productive of injury.

The plaintiff was allowed to prove by parol that she had paid certain taxes against the objection of defendant that the receipts were the better evidence.

Held, that the payment of a sum of money may always be proved by parol, whether a receipt was taken for it or not.

An objection was taken to evidence by plaintiff, to show sales of the land made by herself.

Held, that this evidence was competent for the purpose of showing a ratification of the purchase by plaintiff, which was the sole purpose for which it was received.

The main question discussed, was the proper measure of damages. The Court below ruled that plaintiff could recover "compensation for the loss and injury sustained by plaintiff in consequence of defendant's breach of contract, and that in estimating the damages upon this principle of compensation, the jury had the entire range from the amount that was paid on the contract to the highest value of the land that was proven at the time of the breach, less the amount unpaid upon the same."

Held, that the instruction given was correct as a general rule. But if the contract of sale was made in good faith, and the vendor for any reason is unable to perform, the clear weight of authority is that the vendee is limited in his recovery to the consideration money and interest, with perhaps in addition the cost of investigating the title. By this rule the measure of damages is made to conform to the rule where the party assumes to convey land which he does not own, and an action is brought against him on the covenants of title in his deed. The vendor's good faith is conceded in this case, and is clearly inferable from the evidence. When, therefore, the Circuit Judge laid down a general rule which made the good faith of the defendant unimportant, and gives the vendee in every case a compensation for the loss of his bargain when for any reason the vendor fails to perform, he erred.

Judgment below reversed, and a new trial awarded.

GILBERT v. KENNEDY.

GILBERT vs. KENNEDY.

Where a declaration in trespass lays the trespass with a *continuendo* and the plaintiff gives evidence of a trespass prior to the time laid, he will be held to have elected; his time will not be permitted to go beyond the period in the *continuendo*.

A party will be allowed costs for witnesses in actual attendance, though not called to testify, if they were subpoenaed in good faith.

"Double costs" mean single costs and one half added.

Error to Lenawee Circuit.

Opinion by CAMPBELL, C. J.—Kennedy sued Gilbert before a Justice, for trespass *quare clausum fregit*, and the suit was removed to the Circuit Court on plea of title. The declaration laid the trespass with a *continuendo*, on the 24th of June, 1868, and various other times prior to August 5, 1868, the date of the commencement of suit. A general question was asked, whether Gilbert put any cattle on the premises during the summer of 1868. This was objected to unless confined within the period named, but the objection was overruled and testimony given showing the putting of cattle on the premises in the end of April, the driving them off by Kennedy and their being put back again. A question was then asked, "How long did they remain there?" but objected to as not within the declaration. The objection was overruled and proof submitted of cattle put and found there in May, June and July, and their continuance. It was urged as error that having laid the trespass with a *continuendo*, the plaintiff should not prove any prior trespass, and then prove others either within or without the time, but must elect to prove one anterior or confine himself within the time alleged.

Held, that the rule has long been settled that under such a declaration the plaintiff must elect, and having proved a trespass before the period in the *continuendo*, must go no further. The rule is, that he is to be confined not merely to recovering damages for, but to proving no trespass but the one he elects.

In regard to the question of costs raised, the Court held that if witnesses are made to attend in good faith, and there is reasonable proof of their necessity, the fact that they are not called will not

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prevent taxation for their attendance where the party had reason from the state of the pleadings to believe he required them.

Held, that "double costs" under the statute must be construed to mean single costs and an addition of one-half, when there is nothing to qualify the phrase. As they belong under the statute to the party, and not to the officers or witnesses, the statute is of a penal character and should receive no larger construction than it fairly requires.

BURSON vs. HUNTINGTON.

Joining issue, a waiver of irregularity in service of summons.

The precise language of a deceased person who testify on a former trial not required—substance sufficient.

A promissory note has no legal existence until its delivery.

Error to Kalamazoo Circuit.

Opinion by CHRISTIANCY, J.—Issue being joined in the Justice's Court, in an action of assumpsit, a question as to the proper service of the summons, cannot afterwards be raised.

A witness testifying in the Circuit as to what another witness, since deceased, had testified on the trial before the Justice may, if he is unable to state the precise language of the deceased witness, state the substance of his testimony.

A note has no legal existence until its delivery.

Accordingly where the payee in a negotiable note took the same from the table without the consent of the maker, before the conclusion of the agreement concerning the obligation to be created by the note, and negotiated it before due, *Held* that the note had no legal existence, and its transfer to a *bona fide* purchaser could not make it valid.

MULTON v. MASON, ADMINISTRATRIX, &c.

STORRS H. MOULTON vs. HANNAH MASON, Administratrix, &c.

Opinion by CAMPBELL, Ch. J.—Mrs. Mason, as administratrix brought suit to recover the value of certain goods sold by Moulton to deceased. Evidence was given tending to show the sale and delivery to Moulton of the property; that the deceased and Moulton examined and made an inventory of it which was written by Moulton in a book that he took possession of; that the deceased shortly before his death got said book from Moulton, and made or had made a copy of said inventory, and the book was returned to Moulton. Notice to produce this book and inventory was served on Moulton, and he failing to produce it, an alleged copy was received in evidence against objection.

When defendant's case was in progress, he offered to prove by his testimony, that the paper produced was not a copy of that inventory, or of any inventory ever made by him, or which he ever assisted in making; that he never had in his possession any book containing an inventory of which that was a copy.—This testimony was ruled out.

The principal reason given for excluding this testimony was that it came within the prohibition of the statute as relating to facts equally within the remembrance of defendant and the deceased.

Held, that it is questionable whether said statute has any reference to written documents which are designed to supersede evidence resting in memory only. Where the representatives of the deceased have the means of proving the existence and contents of the document, and take it upon themselves to do so by independent evidence, the case is not within the mischief of the law and is not covered by it. Proof of the correctness of a copy is still more remote. Any one who had compared the papers when made, or subsequently, could give evidence on this point. The copy might be made after the death of both parties or without the knowledge of either when living, and their knowledge or ignorance could not affect its correctness.

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It was also insisted that by not producing the original of the inventory when demanded, the defendant precluded himself from disputing the correctness of the copy.

Held, that the refusal to produce the original, authorized proof by secondary evidence, but it does not dispense with such proof as is attainable, and does not allow proof of it by anything less than satisfactory evidence of all that is essential.—Such secondary evidence may be contradicted, and dispensing with primary evidence, only changes the degree of evidence required. It was not attempted here to produce the original to dispute the secondary evidence after having refused to produce it on request of his adversary. There is no sound reason however why the document itself should have been excluded if so offered. If such a rule could ever have been proper there can be no reason for it where parties are competent witnesses and can be compelled by *subpœna duces tecum* to bring into Court any document in their hands relating to the case, while their adversaries have a right to inspect and prove. If Moulton had the inventory in his possession such a subpœna would have reached it.

The Court below also rejected defendant's testimony offered to show payment made by him to one J. G. Wright, of Oswego, for deceased, and to show an arrangement with one Meader before the death of deceased, whereby Moulton was to pay and did pay Meader, for deceased, a certain sum of money.

Held, that evidence of payment is always admissible in defense of an action of assumpsit, and if money was paid to a third person for deceased, proof that the payment was made and was authorized or ratified, would put it on the same footing as if paid to himself.

The rulings below were erroneous. Judgment below reversed with costs.

PEOPLE *ex. rel.* v. JUDGE OF THE THIRD CIRCUIT.

THE PEOPLE *ex. rel.* FRANCIS GILMAN *vs.* THE JUDGE OF THE THIRD
CIRCUIT.

The intention of the statute, in relation to new trials in ejectment cases, on payment of costs is to give a new trial after a judgment rightfully and regularly obtained. Accordingly where judgment on first trial is reversed for error, second trial had in the Circuit, a third trial may be had on payment of costs, the first trial being treated as a nullity.

Error to Wayne Circuit.

Opinion by CHRISTIANCY, J.—One Hyacinthe Riopelle brought ejectment in the Circuit Court for the county of Wayne, against the relator, and recovered judgment. The relator moved said judgment to the Supreme Court by writ of error, where the judgment was reversed. Upon a second trial in the Circuit Court judgment was rendered for the relator. This second judgment Riopelle asked to have vacated, under the first clause of Sec. 4589, *Comp. Laws*, upon payment of costs, simply. The Circuit Judge granted the motion, and the relator now applies to this Court for a writ of *mandamus* to compel the vacation of said order.

Held, That the intention of the statute was to give the new trial after a judgment regularly and rightfully obtained. The statute was not needed to get rid of a judgment wrongfully or illegally obtained. If it has been wrongfully obtained, as by error of law or fact, it was not a legal and valid judgment, but subject to be reversed, and being reversed, the case stands the same as if no judgment had ever been rendered. The new trial in question is the first new trial under this section. The new trial granted by this Court was not one of the new trials provided by this section. The time does not begin to run till after the first judgment regularly obtained and reversed.

Mandamus denied.

PEOPLE v. NAVARRE

THE PEOPLE vs. PETER NAVARRE.

In prosecutions for penalties under the statute for obstructing highways, (*Comp. Laws*, Ch. 21, Sec. 1, and Ch. 24, Sec. 5.) The People can only appear by some public officer designated by law, and not by private persons or attorneys.

Error to Wayne Circuit.

Opinion by GRAVES, J.—Defendant in error was prosecuted before a Justice of the Peace, in the name of the People, to recover certain penalties claimed to have been incurred by him under the statute against obstructing highways, (*Comp. L.*, Ch. 23, Sec. 1,) and the statute protecting bridges from injury, (*Comp. L.*, Ch. 24, Sec. 5,) and the Justice rendered damages against him for \$12 damages, and \$10 costs of suit, and an appeal was taken to the Court below, where the cause was discontinued by oral consent in open Court, and subsequently judgment was awarded against plaintiffs in error and Joseph Loranger, their security, which were taxed at \$77 25, and execution ordered to issue against plaintiffs and said Loranger for that sum. The only evidence of Loranger's connection with the case is found in this award of judgment. The writ of error appears to have been sued out in the name of the People only, and the assignments of error purport to be by them alone. Loranger does not appear to be a party to the record in this Court.—Neither the Prosecuting Attorney nor the Attorney General is named as attorney for the People, and these proceedings appear to have been conducted by other counsel.

Held, that the People can only appear in this class of cases by some public officer designated by law. They cannot be placed in the attitude of litigants in Court at the will and by the action of private persons or attorneys. Plaintiffs in error are not legally in Court at all. The writ of error was improvidently issued and must be dismissed.

Abstract of Supreme Court Cases, January Term, 1871,

DE VRIES *et. al.* vs. CONKLIN.

Error to Lenawee Circuit.

Opinion by COOLEY, J.—The question presented is whether a married woman can be personally liable in this State on a promissory note which she has signed as security for her husband, and where the sole consideration was the pre-existing debt of the husband. *Held*, that the statute does not confer upon her any authority to create such a demand, and the Court below erred in holding her liable.

JACOB DEFOR vs. THE PEOPLE.

Error to Eaton Circuit.

Opinion by CHRISTIANCY, J.—The charge in the information was of an assault with intent to commit rape. The prosecution gave evidence tending to show an assault with the intent charged, &c. Her evidence was not confirmed by that of any other witness as to any of the more important facts going to establish the truth of the charge, but was contradicted as to several important circumstances by the other witnesses. The defendant, on the trial, made a statement in his own behalf, in which he denied all the allegations of the prosecutrix and characterized them as false and untrue and added that he had never insulted her in his life. The Court, in the charge to the jury said: "The statement of the defendant does not, however, di-

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rectly deny the assault. This silence would go far to confirm the testimony of the complainant."

Held, that this charge was erroneous in assuming as a fact what the bill of exceptions shows not to have been as thus assumed. The third denial that "he had never insulted her in his life" must certainly be regarded in the connection in which it is found, and with reference to her testimony as a direct denial of the assault which her testimony tended to prove. And if his testimony tended to show that "all her allegations (of which the assault was one) were false and untrue," this was a clear and sufficiently direct denial of the assault.

The judgment must be reversed with costs and a new trial awarded.

NORTH AMERICAN FIRE INS. CO. vs. THROOP.

In an action on a policy of insurance against loss to lumber and other property contained in a building, it is not competent to show by parol that a part of the lumber was in the yard adjoining and was included in the understanding of the parties.

Where defendant in such action puts in evidence an application purporting to be signed by the plaintiff, wherein it is stated that there is an incumbrance of only two thousand dollars on the property, and attempts to show that it was incumbered to a greater amount, and the plaintiff denies that he signed such statement but admits that he signed a different one, it is competent for the plaintiff to show that he frequently had told defendant's agent that a greater incumbrance was upon the property.

Where a greater incumbrance exists than is stated in such application, and the defendant's agent filled it up and the plaintiff had previously correctly informed him of the facts, the estoppel is the same as though an individual insurer were himself present and acting.

Where on cross-examination a witness is shown a writing and asked if the signature there is his, he is entitled to look over the whole paper.

Effect of defendant's not disclosing in his application the fact that an attempt had previously been made to fire the building insured, discussed.

Error to Lenawee Circuit.

Opinion by COOLEY, J.—Action upon insurance policy not produced on the trial, having been destroyed by fire. Parol evidence of its loss and contents. Plaintiff testified that the policy insured him against loss or damage by fire to the amount of

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\$3,000; \$500 on building, and \$2,500 on lumber, felloes, poles, bows and shafts, manufactured and in process of manufacture, contained in said building.

After stating the value of the goods manufactured and in process of manufacture in the building at the time of the fire, he proceeded to say that he had 100,000 feet of lumber, which cost about \$24 per M., and was worth \$30 per M. About one-third of it was in the building, and the rest was in the yard.—The plaintiff, claimed that the lumber in the yard was covered by the policy and testified to conversations with the agent of the company, wherein he told the latter that he wanted the whole property insured, outside of the building as well as inside. This testimony was objected to as incompetent, and the Court overruled the objection.

Held, that this was an error. It is conceded that it was not competent to extend or enlarge by parol the terms of the written contract. But it was argued that it came within that class cases, of which *Facey vs. Otis*, 11 Mich., 213, affords an example in which parol evidence has been received to show the circumstances under which a contract has been made for the purpose of explaining its contents where ambiguous; or of another class, in which it has been held that where parties come to an agreement concerning the meaning of equivalent words employed in their contracts, the courts will construe them according to the understanding arrived at. After an elaborate review of the contract and testimony the Court concluded that the contract covered only the stock of lumber in the building.

The second error relates only to the admission of evidence touching the incumbrances upon the property covered by the insurance. The defendant put in evidence an application, purporting to be signed by the plaintiff and which their witness testified was the application on which the risk in question was taken. This application contained the following questions and answers: "Is there an incumbrance on the property?" "Yes." "If mortgaged, state the amount and to whom?" "Two thousand dollars, to Topliff & Day." Appended to this application was the following understanding: "And the said applicant hereby covenants and agrees to and with the said company that the foregoing is a just,

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full and true exposition of all the facts and circumstances in regard to the condition, situation and value of the property to be insured, so far as the same are known to the applicant, and material to the risk, and the same is hereby made a condition of the insurance and warranty on the part of the insured."

Plaintiff denied signing this application, but testified that he signed a different one, to which an agreement was appended, which set forth that the "foregoing is a just, true and full exposition of all the facts, etc., so far as the same appertain to the risk." Plaintiff was allowed under objection, to testify that he had repeatedly told defendant's agent in regard to the incumbrance, as they boarded together, and the fact of the mortgages to Hunt, and Topliff & Day, and to W. H. Stone, together with their several amounts, was well understood between them. The objection to the evidence was that it had a tendency to vary the written contract, in which plaintiff covenanted that there was only one mortgage of \$2,000 on the premises, and would, in fact, exempt from the covenant other mortgages.

Held, that at the time this evidence was offered it was competent. Defendants had put in a paper which they claimed was the application which plaintiff had signed. Plaintiff denied having signed it, but admitted having subscribed a different one, which was not produced. The question what were the contents of the application actually made and what covenants it contained was therefore a matter of dispute, and as bearing upon this the conversation between the parties concerned in putting it in writing was, or might be, of material consequence. There was therefore no error in admitting the testimony. But the Circuit Judge went further and instructed the jury that even though the application produced by the defendants was the one signed by the plaintiff, yet if defendant's agent filled out this application, and the plaintiff had previously given him full and correct information concerning the incumbrances, then the failure to specify the other mortgages in the application would not vitiate the policy or preclude a recovery. The Court say that the question raised by this charge has been the subject of much legal controversy, and after an elaborate discussion of the whole matter it was held that the estoppel is precisely the same where the agent of the insuree drafts the papers as it would be in the case of an individual insurer who was himself personally present and acting.

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The plaintiff, while upon the stand as a witness, having denied the signature to the application produced by the defendant as the one upon which the policy issued, was cross-examined with a view to test the truthfulness of the alleged signatures. In the course of the examination counsel for the defense presented to the witness a paper folded so as to show only the name of the plaintiff in writing, and asked him if the signature there pointed out was his. The Court allowed the witness to look over the whole paper.

Held, That this was correct. The witness was entitled to all the forms of recognition which the circumstances and surroundings afforded.

In the application presented in evidence by the defendants were the following questions and answers: "Incendiarism—Have you any reason to believe your property is in danger from it?" "No." In the blank form produced by the plaintiff, and which was filled up and signed, the corresponding question is as follows: "Has a building on the site of this been burned? Have you any reason to believe your property is in danger from incendiaries? If so, how did the fire originate, and in what office were you insured?" Plaintiff gave evidence respecting a former supposed attempt to fire the building, and upon this evidence defendants requested the Court to charge that if the jury believe from the evidence that at the time of procuring the policy, plaintiff knew that an attempt had been recently made to burn the premises insured, and failed to disclose that fact to defendant's agent, who issued the policy, defendant is entitled to recover, if the jury believe from the evidence that a written application was made by plaintiff to defendant, upon which the policy was issued, in which application plaintiff stated that he had no reason to fear that his property was in danger from incendiarism, and they find as a matter of fact that he had such reason, then their verdict must be for defendant. These requests the Court refused, but charged that if the jury believe from the evidence that at the time of making the application plaintiff had ceased to fear incendiarism, and did not think he had any reason to believe that his property was in danger from it, then the fact that it was once fired will not vitiate the policy, and was not a breach of warranty; if the jury believe from the evidence that an attempt had been made to burn the building covered by the policy sued upon, shortly prior to the appli-

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cation made by plaintiff, and that plaintiff then knew of such attempt and did not disclose it to the agent, and if the jury believe that a knowledge of such attempt was material to the risk, then their verdict must be for defendant, if the agent of defendant had not sufficient knowledge to put him upon inquiry as to said prior attempt to burn the building.

Held, That the Court erred in the refusal and in the charge given, first in assuming that an attempt to fire the building insured might be a circumstance not material to the risk, and second in treating the information which was sufficient to put the agent upon inquiry as sufficient to justify plaintiff in his failure to communicate the facts within his knowledge, notwithstanding his attention was particularly called to the subject at the time the application was prepared and signed.

Held, Also, that the Court erred in charging as requested by plaintiff, that if the jury believe from the evidence that the application produced by defendant is not the legitimate application signed by plaintiff, and upon which the policy issued, then there is no proof in the case upon which the jury are authorized to find what the contents of this application were, or that there was any warranty in it to affect plaintiff's right of recovery. The evidence of plaintiff sufficiently shows that he was inquired of concerning attempts at incendiarism, and that he gave a negative answer. It also shows that he warranted the correctness of his answers so far as pertaining to the risk.

The judgment was reversed, with costs, and a new trial ordered

 FREEMAN McCLINTOCK vs. ALVA C. LANG et. al.

Where the complainant's equity is based upon a refusal to perform a parol agreement to give a mortgage upon lands, the Court will not enforce it when such understanding or agreement was indefinite, and no steps were taken toward repaying such mortgage and agreeing upon its terms.

Where notice of taking testimony does not proceed from any party having the right to give it the Court will suppress such testimony as irregularly taken.

Where a decree is taken for too large an amount it will be reversed and cause remanded.

Appeal from Shiawassee Circuit in Chancery.

Opinion by COOLEY, J.—The bill in this case appears to have

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been filed to enforce an equitable lien on eight acres of land, and also to foreclose a mortgage on ten acres of the same land. In February, 1857, defendant, Alva C. Lang, who is, or was, the husband of the defendant, Harriet C., was owner of the ten acres of land mentioned, and being then in debt to the complainant, and being also desirous of obtaining from him advances to enable this defendant to build a house and make other improvements on said land, conveyed the land to complainant by a deed, absolute in form, his wife joining therein, which deed, however, was intended as a mere security for such indebtedness and advances. While complainant so held said land as security, said Alva C. Lang proposed to him that it be reconveyed, and said Alva would file the necessary document in the office of the Register of Deeds, setting the same apart as a homestead; and could then give complainant a mortgage signed by himself and wife to secure the amount due to complainant. And complainant, relying upon this promise, did reconvey the land to said Alva by deed, dated May, 1859, and the said document was then filed, as promised. The bill alleges that defendant, Harriet C., knew of the indebtedness and advances, and that the same accrued and were made to said Alva in the purchase of said land and in the improvement thereof; and she was also cognizant of the agreement to secure the same by mortgage. The bill was filed May, 1867, and amended August, 1867, at which time the sum of \$577 was claimed to be due and secured by this equitable lien.

While the complainant has been sleeping for eight years upon his rights, the position of the other parties has changed in important particulars. Harriet C. has become the owner of the land, and Alva C. claims to have obtained a divorce from her, and now appears as a witness in this case to make out the necessary facts to establish the lien. The present suit was not instituted until the debtor defendant had parted with the property to be charged, and he comes forward with his own testimony to establish a lien upon his own debt upon lands owned by his co-defendant, with whom, in the meantime, he has had difficulties sufficient in his own opinion to warrant a divorce.

But the Court refused to put a decision of the case upon the laches of the defendant, and held that the bill so far as this equitable lien is concerned, is in the nature of a bill for the specific perform-

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ance of a contract. The complainant's equity is based upon the refusal to perform a parol agreement to give a mortgage upon lands. On a review of this branch of the case the Court held that the alleged understanding was very indefinite at best, and that no steps were ever taken toward preparing a mortgage or agreeing upon its terms.—The claim was therefore denied.

Upon the other branch of the case a question of practice becomes important. Mr. Lang interposed a defense to the mortgage, and took evidence in support of such defense. This evidence, however was suppressed by the Court as irregularly taken, because the notice of taking the same did not proceed from any party having the right to give it.

Held, That the Circuit Judge properly suppressed it. The notice did not come regularly from the solicitor.

The evidence of the defense being properly suppressed the Court below had no discretion but to give decree for the amount of the mortgage. But the decree actually made having been too great, it must be reversed and the cause remanded, with direction to enter a decree in accordance with these views. A reference is ordered for the purpose of accounting.

GEORGE H. RUSSELL vs. JAMES A. SWEETZ.

A grantee of lands having notice of a prior unrecorded deed of such lands is not a *bona fide* purchaser as against such deed and title.

A deed is not void for uncertainty of description because it does not expressly specify that the land is in this State, where the circumstances clearly indicate the situation and location of such land.

Error to Barry Circuit.

Opinion by GRAVES, J.—Plaintiff in error brought action of ejectment against Sweetzey for a certain tract of land in Barry County. The case was tried by a jury, who returned a verdict for the defendant, upon which judgment was entered. It appeared on the trial that one Hosea B. Huston obtained a patent from the United States in May, 1839. Plaintiff proved that the patentee died

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at Kalamazoo in 1849, leaving Mary A. Huston, his widow, and three children sole heirs at law. He also gave in evidence the record of a deed for the lands described in the patent, bearing date January, 1867, and executed by the aforesaid widow and heirs of Huston to plaintiff. Defendant offered in evidence the record of a deed bearing date September, 1847, from the patentee and his wife to Nathaniel M. Brown, purporting to convey the above described tract. This deed appears to have been acknowledged before a Justice of the Peace, and to have been executed in the presence of the acknowledging officer, who signed it as a subscribing witness. It was placed on record July 10, 1869. The admission of this record as evidence in the case was objected to by the plaintiff on two grounds. First, that the deed was not recorded until after the commencement of this suit, and second, that being unrecorded at the time of the purchase by the plaintiff, it was void as against the prior recorded title of the latter. The evidence was admitted and the plaintiff excepted.

After a full review and discussion of the facts in the case, the Court concluded that it appeared on the trial beyond doubt, as it appears on the record, that when Russell purchased, and when he got his deed, he had notice of the prior unrecorded deed of Brown, and of Swezey's title, and hence he was not a *bona fide* purchaser as against such deed and title.

Upon the argument, plaintiff's counsel contended that this deed to Brown was void for uncertainty of description, because it did not expressly specify that the land was in this State.

Held, That there is no force in the objection. The grantor in that deed was the patentee of this land, and he is described in the deed as a resident of the county of Kalamazoo, which adjoins that in which this land is situated. The grant was executed and acknowledged in the county of Kalamazoo, and before an officer of the county. The grantor is not shown to have been in any other State or to have owned any other land. The patent specified the land as being in the district of lands subject to sale at Kalamazoo, Mich, and the description in the deed in respect to the section, and the subdivision of it, and also in respect to the township and range, agrees with the patent.

The case made on the trial was so clear and complete against the

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plaintiff that it would not have been error if the Court had directed the jury to find for the defendant.

The judgment must be affirmed with costs.

 HONORIA BROWN vs. JOHN BROWN.

In a bill filed for divorce under Sec. 3228 *Comp. Laws*, for refusal to support, it is not necessary to aver any cruel treatment except what is involved in the gross, wanton and cruel neglect and refusal of the defendant to support his wife, he being of sufficient ability.

Either party during the period allowed for taking proofs, may introduce any relevant testimony at any time before the proofs are closed.

Appeal from Ionia Circuit.

Opinion by COOLEY, J.—The bill in this case was filed to obtain a limited divorce and for alimony. The parties were married November 10, 1845, and the bill avers, as the cause for divorce, inhuman and cruel treatment for the last three or four years, and neglect to support for the last year. The bill contains further allegations, showing the pecuniary ability of the defendant to support his wife well, and that she has always been faithful and devoted in her marital relations.. It was not claimed by the complainant that this bill would warrant a divorce for extreme cruelty, nor was the evidence in the case taken on any such theory. On the contrary, all the evidence is directed to the question of a gross, wanton and cruel neglect and refusal to support. A question is made in this Court of the sufficiency of the bill to warrant any decree for complainant, and the testimony taken appears to have been objected to on the ground that no case was made by the bill, because the cruelty charged was not set out with more particularity.

Held, However, that a bill for divorce on the ground of refusal to support is sufficient. In suing for divorce on that ground it was not necessary to aver any cruel treatment, except what was involved in the gross, wanton and cruel neglect and refusal of the defendant to support his wife, he being of sufficient ability. It appears, however, from the evidence, that the complainant is living apart from the defendant and that while he refuses to furnish her the means of

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support away from his home, he nevertheless expresses a willingness to receive and support her there. The bill was sufficient, the pleadings were correct, and the evidence was admissible under them.

The Court took the occasion to remark upon a matter of practice. It seems that the Circuit Court Commissioner regarded it as his duty to hold the parties to the same order of proof to which they would be held in a trial at law, and he accordingly refused to take certain evidence, because, though relevant to the party's case or defense, it was not brought forward by the party until the time for rebutting testimony, and was not rebutting in character.

Held, That the Commissioner has mistaken the practice. Either party, during the period allowed by the rules for taking proofs, has a right to take his testimony in any order he may choose, and the complainant is not precluded from offering proof in support of his original case by the fact that the defendant has gone into or gone over his defense. The same is true of the defendant. He may put in any relevant testimony at any time before the proofs are closed.

EDWARD S. GEARY vs. THE PEOPLE.

Exceptions to a charge must point out specifically the errors complained of.

The law of 1869, requiring charges to be written does not operate to make the charge a part of the record so as to be reviewable as an entry.

The interest or bias of a witness may be shown, as bearing upon the credit of the witness.

Error to Eaton Circuit.

Opinion by CAMPBELL, Ch. J.—Plaintiff in error was charged with an assault with intent to commit rape, and was convicted of an assault. There was one general exception to the entire charge of the Court, pointing out no particular matters complained of in it.

Held, That exceptions to a charge should be specific enough to show what parts of it are regarded as error, or how it injuriously affects the rights of the party excepting.

It is claimed under the law of 1869, requiring charges to be

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written, that the charge becomes a part of the record and is reviewable as an entry.

Held, That there is no change brought about by that law in the nature or functions of a charge. It merely substitutes a written charge for an oral one. But the charge can only be brought up as it would have been formerly by exceptions, or case made, and the exceptions must be taken in the same way as before.

The only errors properly assigned relate to the exclusion of certain testimony designed to impeach the credit of the complaining witness. She had denied having conversations with various persons concerning her expectations of receiving some profit out of the trial. When the defendant sought to show that she had made statements to that effect the Court refused to permit the proof to be made.

Held, That the proof should have been admitted. The interest or bias of a witness has never been regarded as irrelevant. It goes directly to his credit, and must determine with the jury how far facts depending on his evidence are to be regarded as proven.

The judgment must be reversed and a new trial granted.

ELLEN DONAHUE vs. JACOB KLASSNER.

An estoppel by land contract arises from the fact that possession which would not have been acquired without it, cannot be honestly be retained in defiance of it.

A deed was made and acknowledged in N. Y., in 1843, without witnesses. Clerk's certificate as to acknowledgment, was made in 1856, but does not purport to have been made by a Clerk of a Court of record. *Held*, that the deed was invalid.

The fact that restitution of premises is obtained from a judgment in an action of ejectment, does not change the burden of proof on a subsequent trial of the same cause.

Error to Berrien Circuit.

Opinion by CAMPBELL, Ch. J.—This is an action of ejectment, and the principal inquiries in it relate to the validity and construction of a conveyance and the effect of a contract by way

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of estoppel Plaintiff below, in order to prove his title, showed a patent from the United States to D & J. Petrie, a deed from the Petries to one Barns, and from Barns to C.^gF. Howe. He introduced evidence further to show that Howe had made a contract to sell the land to Philip Donahue, under whom defendants below claimed as heirs-at-law, and that Donahue, failing to pay what was due, Howe assigned the contract and quit-claimed the land to plaintiff.

Plaintiff below testified that Philip Donahue was in possession claiming ownership before he took the contract by conveyance from one Jones, who had purchased of David Conant, and that Conant had improved it, and had entered under a tax title. The first question arising was whether Philip Donahue was estopped by the land contract from disputing plaintiff's title.

Held, That he was not. He got no possession from Howe, but simply retained a possession he already claimed under color of right. A person in possession is not debarred from fortifying his title by getting in any outstanding titles which he can purchase. The most satisfactory doctrine in regard to the foundation of estoppels by land contract, where there is no independent or special covenant standing as a sufficient foundation, is that the estoppel arises from the fact that the possession which would not have been obtained without it cannot honestly be retained in defiance of it. But if not so obtained, the only thing that could be derived from the contract would be the title, and, of course there would be no justice in compelling a man in possession to give up to one who has no right, and who could not therefore fulfil his own contract. In a suit on the contract itself, the vendor would not recover without ability to perform on his part. Plaintiff's title, therefore, becomes of primary importance.

Held, That the deed from Petrie to Barns was invalid. It was made in New York without witnesses, and acknowledged in 1843. The clerk's certificate, verifying the acknowledgment was made in 1856, and does not purport to have been made by the clerk of a court of record. This disposes of the case, but some rules were laid down to guide in a new trial.

He'd, That there is no foundation for the claim, that the fact

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that restitution of the premises was obtained by plaintiff below on a former judgment changes the burden of proof on a new trial and compels the defendant to prove his own case. Upon the new trial the case must be tried just as if it had never been tried before. The deed of Barns is also objected to as not appearing to cover the land contained in the descriptive part of the declaration.

Held, that it is evident that but a small portion, if any of the land described in the declaration is covered by this deed.— And as there is no evidence in the case tending to identify the boundaries at all the deed was not available as a source of title upon the facts as returned.

Judgment must be reversed, and a new trial ordered.

SUPPLEMENT.

Abstracts of Decisions of the Supreme Court, rendered at the January Term, 1871.

SIMEON HOVEY vs. JAMES SMITH.

In a deed of lands belonging to the husband, though the wife join in the deed, with covenants, yet the covenants will be held to be those of the husband alone. Declaration—Description of lands in, &c.—Allegation as to covenants.

Error to St. Clair Circuit.

Opinion by CHRISTIANCY, J.—This was a question of covenant brought upon the covenant of seizin and good title contained in a deed of conveyance of land. The questions involved were upon exceptions taken to the admission of evidence.

Held, That there was no error in admitting the deed claimed to contain the covenant declared upon. The objection was that it was inadmissible under the declaration, and the objection was sought to be sustained on two grounds.

1. That the deed appears to have been executed by different parties, or by another party beside the one described in the declaration.

2. That the description of the land which the deed purports to convey is different from that described in the declaration, as conveyed by it.

The deed offered was executed by the defendant and his wife to the plaintiff. But it appears from the evidence that the land was not the individual property of the wife. The only use in the wife's joining in the deed was to release her contingent right of dower. Her covenant would be void, and any

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covenant made by the two would be the sole covenant of her husband. The deed was the conveyance of the husband, the covenant was his, and there was therefore no material variance in the declaration.

The declaration purports to describe a part of the land described in the deed, and the covenant was alleged to be broken only as to a part of the land. The declaration alleges the conveyance to have been of "certain pieces or parcels of land situated in the Township of China, St. Clair County, among which were the following pieces or parcels of land," and then follows the description of eighteen acres by metes and bounds, a description, however, which does not, at least in words, correspond with any particular piece of land as described in the deed. And this is the variance in the description to which objection is taken.

Held, That whether the lands described in the declaration were included in the lands described in the deed was properly a matter of proof. It was not required to describe in the declaration in the words of the deed, unless the pleader undertook to give the description of the title *in hac verba*, but was always matter of evidence outside of the deed to bring the land described in the declaration within the description contained in the deed.

Another ground of objection was considered by the Court, which was as follows: The covenant was in form plural, applying to the wife as well as to the husband, and yet it was in law the covenant of the husband alone. It was also in form that they were well seized of the premises, etc. Though the declaration sets this out as the covenant of the defendant, yet it states the seizin covenanted for, as in the deed, that they were well seized etc. As the declaration thus leaves it entirely uncertain who were seized, not mentioning the wife at all in this connection it would clearly have been bad upon demurrer. But after trial and verdict, the Court held the declaration good, as there was no verbal variance between the covenant set out in the declaration and that contained in the deed, it appearing from the record who the parties were, entering into the covenant, and it being deemed by the Court that the word "they" was simply a

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clerical error for the word "his." It probably arose from the use of the printed blank, in which the plural is employed. It was therefore held that there was no error in the admission of the deed.

COLIN CAMPBELL *et. al.* vs. MARY WHITE.

A married woman living with her husband, is liable for goods belonging to the class of family necessities, used by her husband's family, where such goods were purchased by her, on her individual credit.

Absence from the State, to prevent the operation of the statute must be actual, not merely constructive; returns of the debtor, to set the statute running again, must be sufficiently open to enable the creditor, with reasonable diligence, to serve process upon him, and it must not be a secret one, designed to deceive and mislead the creditor. Open visits, which might well be known to all persons, are to be credited to the debtor, while on the other hand successive absences may be accumulated against him.

Error to Wayne Circuit.

Opinion by GRAVES J.—Three questions were involved in this case, two of which were as follows:

1. Whether a married woman, residing with her husband and owning a separate estate, can be held liable for merchandise purchased by herself on her individual credit and sole agreement to pay for it in case the items belong to the class of family necessities, and are actually used by the husband's family and in his household.

2 The legal bearing and effect of the visits of Mrs. White to Detroit, under the circumstances stated in the record, she being a resident of Canada.

Held, That the first question should be answered in the affirmative, upon the grounds stated by Cooley, J., in *Tillman, vs. Shackleton*, 15 Mich., 447. The liability of the wife was consequent upon her obtaining of the goods on her sole credit and individual promise to pay for them, and was not conditional upon the kind of use to which the goods should be subsequently put. Of course the principles which apply here can bear no relation to the doctrine of those cases where goods are furnished

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to the wife or family at the instance of the wife, and are considered as furnished to the husband, or at his expense.

Defendant's residence in Windsor, Canada, was not controverted, though the evidence tended to show that she was frequently in Detroit. A question was raised whether those visits affected the application of the statute of limitations. The provision of the statute is, that "if after any cause of action shall have accrued, the person against whom it shall have accrued, shall be absent from and reside out of the State, the time of his absence shall not be taken as any part of the term limited for the commencement of the action." The condition upon which the suspension of the statute depends, requires the concurrence of two facts: residence out of the State and absence from it; and without the conjunction of these two elements the condition will be incomplete.

Absence from the State, to prevent the operation of the statute, must be actual, not merely constructive; returns of the debtor, to set the statute running again, must be sufficiently open to enable the creditor, with reasonable diligence, to serve process upon him, and it must not be a secret one, designed to deceive and mislead the creditor. Open visits, which might well be known to all persons, are to be credited to the debtor, while on the other hand successive absences may be accumulated against him.

JOHN FOLEY, FRDERICK FLEMING AND DENNIS CORKERY *vs.* THE
PEOPLE.

Error to the Recorder's Court of Detroit.

Opinion by GRAVES, J.—Plaintiffs in error were tried in the Recorder's Court of Detroit for robbery, and having been convicted and sentenced, brought error to this Court. The question is raised on the exclusion of a question put to Foley on his examination by the prisoner's counsel. That question was whether he was a deserter from the English army. *Held*, That the question was not rel-

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ative to the issue, and whether he had or had not escaped from the military service of a foreign government cannot affect his veracity as a witness in our courts. If the inquiry was intended to draw from the witness an account of his antecedent life it was subject to the sound discretion of the Court, and the witness was fully questioned on that point.

ADDISON OSBORNE vs. JOHN C. FORSHEE.

Where the alleged slanderous words are set out in a declaration in an action for slander, it is error to permit counsel to read to the witness for plaintiff the words in the declaration and then to ask him in relation thereto.

Where defendant in an action for slander, had, while a witness in another cause, admitted in answer to a specific question the use of the slanderous words imputed to him, to the plaintiff, *Held*, That such admission should not be given in evidence against him.

Error to Washtenaw Circuit.

Opinion by GRAVES, J.—Forshee having sued Osborne for verbal slander and recovered judgment, the latter complains of several rulings made upon the trial. The ground of action, as stated in the declaration, was that Osborne, "in hearing of divers persons, falsely and maliciously uttered of and to the plaintiff the following false words: "You are an old thief and swore to a lie, and I can prove it by Sunberg; I can prove it by Bunce's docket." When plaintiff was on the stand as a witness his counsel read to him the statement in the declaration relative to Bunce's docket and then asked him if there was anything said about Bunce's docket. This was objected to as incompetent, but the objection was overruled.

Held, That the Court erred in admitting the testimony in that shape. By allowing the paragraph in the declaration to be read as an introduction to the question put to the party, the Court, in substance permitted the plaintiff's counsel, under the guise of an examination of the plaintiff himself, to make known to the latter the very facts which the form of the declaration required to be shown and which his counsel wished to find asserted in and by the answer to be given.

Plaintiff was further permitted to show, under objection, that on

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a trial before one Justice Palmer, the defendant, while being examined as a witness, testified in answer to a specific question, that he had told Forshee that he had sworn to a lie and that he (Forshee) could prove it from Bunce's docket.

H. Id., That the evidence was improperly admitted. Defendant's evidence elicited in the case before Palmer was so far privileged as to preclude plaintiff below in this case from using it as an admission of the slander imputed.

H. Id., also, That the objection to evidence of the defamatory words on the asserted ground that the declaration does not allege that they were spoken of and concerning the plaintiff, cannot prevail. The averment is not what the objection assumes it to be.

The judgment below must be reversed with costs and a new trial ordered.

THE PEOPLE vs. MICHAEL NOLAN, WM. ROGERS AND PETER NICAISE.

Burglary.—Entry through grating over an excavation adjoining a cellar window.

Error to the Recorder's Court of Detroit.

Opinion by CHRISTIANCY, J.—Defendants were tried in the Recorder's Court of Detroit upon an information charging them with having broken and entered the store or shop of one Murray, in the night time with intent, etc. The evidence tended to prove the larceny in the store, and that the defendant entered in the night time through an area outside of the cellar which would seem to have been excavated adjoining the cellar window, and which was covered with an iron grating as is usual in such cases, the defendants raising the grating for that purpose, then passing through the window which was not shown to have been shut at the time, into the cellar and thence up a stairway through a trap door, which was shut, into the store. It was objected in the Court below, and this is the principal objection urged here, that this did not constitute a breaking within the meaning of Sec. 5756, *C. L.*; but that the only breaking shown was an interior breaking of the trap door, after getting into the cellar, and that such interior breaking does not come within the provisions of this section, as it would in the case of a dwelling house at common law.

Held, That the area or excavation in front of the window covered and protected by the iron grating should properly be considered as part of the cellar, and the grating as part of the window. Therefore the taking up of the grating constitutes an exterior breaking as clearly as the opening of the window itself, or of an outer door.

**Abstracts of Decisions of the Supreme Court, rendered at the
April Term, 1871.**

HYACINTHE RIOPELLE vs. FRANCIS GILMAN.

Construction of statutes with reference to the time of bringing actions for the recovery of lands.

Error to Wayne Circuit.

Opinion by CAMPBELL, C. J.,—This was an action of ejectment in which the defendant below moved judgment against the plaintiff, who complains in this Court of certain rulings, which are only important in case the suit was not barred by lapse of time. That question, therefore, was first considered. There was no dispute in regard to adverse possession by the defendant for something over twenty-two years. There was a contest as to a period before that which extended back to 1846, about twenty-six years. The dispute, therefore, in the outset, was as to the effect of the statute. The case is governed by sections one and six of the *R. vis d. Statutes* of 1838, the former providing that "No person shall commence an action for the recovery of any lands or make any entry thereupon unless within twenty years after the right to make such entry or bring such action," first accrued or within twenty five years after he, or those from whom he claims, shall have been seized or possessed of the premises, except as hereinafter provided."

Section six declares that "no person shall be deemed to have been in possession of any lands, within the meaning of this chapter, merely by reason of having made an entry thereon, unless he shall have continued in open and peaceable possession of the premises for the space of one year after such entry, or un-

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less an action shall be commenced upon such entry and seizure within one year after he shall be ousted or dispossessed of the premises."

The two limitations cannot properly be blended together.—The statutes require that every action shall be brought within twenty years from the time it accrued; also, that a party must bring his action within twenty-five years after disseizin, whether the persons in possession during the interim claim from each other or not, saving only the case where, within one year from the disseizin an action has been brought against the disseisor.—The object is to compel every party disseised to use some diligence, and to bar his entry after twenty-five years' practical abandonment of his title to strangers. As this cause of action accrued twenty years before suit was brought, it is barred at all events, and the other questions become immaterial.

Judgment affirmed with costs.

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T. gave his note which was partly written and partly printed. The printed portion conclude with the words, "with interest at." After the note was delivered to the payee, the words and figures "10 per cent" were added after the printed word "at," without the knowledge or consent of the maker. The plaintiff was a *bona fide* holder before maturity. *Held*, that the alteration should be treated as a forgery, and that the case was not such as would bring it within the rule which would hold the maker liable on the ground of negligence.

Error to Washtenaw Circuit.

Opinion by CHRISTIANCY, J.—This was an action brought by Holmes against Tramper on a promissory note signed by the latter, which was partly printed and partly in writing, a printed blank having been used. The following is a copy of the note:

\$400.

One year after date I promise to pay to Lyman Terry or bearer, four hundred dollars at the first National Bank of Ann Arbor, value received, with interest at 10 per cent.

JACOB TRAMPER.

There was evidence tending to show that the note had been al-

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tered after it was delivered to the payee, by adding after the printed word "at," the "10 per cent," and that this alteration was made without the knowledge or consent of the maker. The plaintiff was conceded to be a *bona fide* holder before maturity, and the only question in the case was whether the wrongful alteration of the note rendered it void in the hands of the plaintiff, and constituted a defence as against him in favor of the maker.

Unless the note, *as signed*, can be treated as a note given in blank, so far as relates to the rate of interest, giving the payee or holder the right to fill the blank by inserting the rate, the alteration must be treated as a forgery, since it is one which, if valid, would enlarge the liability of the maker. And the Court was satisfied that the note was a complete and valid instrument when it stopped at the word "at." The word may have been disregarded, being in print, or may have been overlooked, and the Court considered that there was no such blank as would warrant the payee in inserting the interest clause.

Counsel for plaintiff in error, however, contended that, though there may be forgery in this note, the peculiar facts of the case bring it within a principle that the maker was guilty of negligence in leaving a blank apparently intended for the insertion of the rate per cent. unfilled, and instead of drawing a line through the blank, or erasing the word "at," to indicate that it was not to be filled, and that he thereby invited and facilitated the forgery in a manner calculated to impose upon innocent parties and that he must therefore, as between him and such innocent parties, be held to pay the note in altered form in the same manner as if it had been originally drawn.

Held, That upon principle, and according to the weight of authority, the liability of the maker upon the note, as altered, cannot be maintained. Where the party is made to sustain the loss, the person causing it has usually been his agent, or the party by his acts or negligence has authorized the person sustaining the loss to consider him as such. And where one has been held liable for negligence, he has been held liable only for the shape of the instrument as it went from his hands, and not as criminally altered by some third party. Such a crime could create no contract.

SHOTWELL vs. HARRISON.

SHOTWELL vs. HARRISON.

It is incumbent on a party claiming title by priority of record of deed, to show, affirmatively the payment of a valuable consideration, and this by other evidence than the mere recital in the deed.

Error to Van Buren Circuit.

Opinion by CHRISTIANCY, J.—This was an action of ejectment. The premises in question were patented to Thomas B. Millard, May 1st, 1839. Both parties claimed under title derived from Millard. Millard, in August, 1837, executed a warranty deed of the premises to Monroe; Monroe conveyed to Crittenden, in March, 1837, and Crittenden's heirs to Harrison, plaintiff in the Court below.—In 1865, Millard executed a second deed (quit claim) for the premises, and Shotwell, by *mesne* conveyances, claims under this quit claim deed, and by priority of record.

It was objected that the deed from Millard to Monroe was not admissible purporting to be executed long before the issuing of the patent to Millard, and that the Court erred in charging the jury that this made no difference in the case.

Held, That this objection was not well taken. The deed contained a warranty, and operated as an estoppel against him and all who might claim under him.

2. It was objected that the deed from the Crittendens was not admissible, because it was executed and acknowledged in the State of Massachusetts, and the Clerk's certificate to the official capacity of the Justice who took the acknowledgment did not show that the Clerk so certifying was the Clerk of a court of record, as required by the statute.

Held, That it appeared that the Clerk was the Clerk of the Supreme Judicial Court of Massachusetts, for the county of Franklin, and this Court will take judicial notice that it is a court of record.

The defendant set up the following chain of titles :

1. A quit claim deed from Millard to Thomas Silliman, of January 4, 1865, and recorded in Van Buren county, the next day, three years before the deed from Millard to Monroe was recorded.

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2. A quit claim deed from Thomas Silliman to Mary Conway, dated January 4, 1865, which was recorded October 30, 1867.

3. A deed from Mary Conway to David Bacon, dated October 29, 1867, and recorded October 30, 1867.

4. A quit claim deed from Bacon to the defendant, dated January 6, 1868, and recorded in Van Buren county, January 14, 1868, more than a month prior to the recording of Millard's deed to Monroe.

The Court below charged the jury that to enable the defendant to avail himself of the priority of record of the deeds through which he claimed, either the defendant or some of his grantors, after Millard, must be found to have purchased in good faith and for a valuable consideration, and that the burden of proof was upon the defendant to show affirmatively such consideration, and that by some other evidence than the mere recital of it in the deed.

The old deed from Millard to Monroe was recorded in Barry County, and a certified copy recorded in Van Buren County. *Held* That the record of this copy could not be received as evidence.

[The original deed, however, was introduced in evidence.—REP.]

Held, That the Court below, erred in refusing to charge that the whole chain of deeds given in evidence by the defendant had priority of record against the plaintiff.

[For citation of authorities, see brief of counsel in this case, as reported in 1 *Mich. Nisi Prius*, 54.—REP.]

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Where a person is induced through fraud, to sign an entirely different instrument from what he intended, such instrument is to be treated as a forged instrument, and as creating no liability against the signer.

Error to Oakland Circuit.

Opinion by GRAVES, J.—Linabury sued Gibbs before a Justice and declared upon the following note :

\$120.

Avon, Nov. 3, 1869.

On or before the first day of August, 1870, for value received,

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I promise to pay to Clark and Brooks, or bearer, one hundred and twenty dollars, with use, payable at First National Bank, at Pontiac.

GRAHAM GIBBS.

Defendant pleaded the general issue and denied the execution of the note. On the trial in the Circuit, plaintiff first called Gibbs to prove the signature, and he stated the signature resembled his handwriting, but he could not swear it was his.

Plaintiff secured the note before maturity and paid a valuable consideration for it. Defendant testified that November 3, 1869, a stranger named Brooks came to him and proposed to him to become an agent for a hay fork. Finally, defendant agreed to take the agency, and at his house he, Brooks, and an associate of the latter executed some papers. It was getting dark when Brooks presented these papers, one of which defendant examined. The third, Brooks pretended to read to him, and when defendant asked what the "\$120" contained in it meant, Brooks explained that it was to show how much was going to manufacturers after a certain number of forks were sold. The defendant, whose eyesight was bad, signed the three papers, it being then so dark that he could not read their contents or even his own signature, and Brooks went away, taking two of the papers and leaving the other. Brooks left a fork, and the paper left was a commission authorizing the defendant to act as agent of the forks. The latter was ignorant of signing any note, and if the paper produced in evidence was his note, it was obtained under the circumstances mentioned.

The Court directed the jury that if Brooks obtained the signature of the defendant as claimed by the latter, the latter supposing he was signing a contract and not a note, and delivered the paper to Brooks, it made no difference whether the paper so signed was at the time a blank note or filled up as a note. If the handwriting of the signature was that of the defendant, and the plaintiff was an innocent purchaser for a valuable consideration, before maturity, the plaintiff was entitled to recover. The requests of the defendant, which were in accordance with the cases of *Foster vs. McKinnon* and *Whitney vs. Snyder*, were refused.

In this case the defendant intended to deliver a paper with his name upon it, but not a negotiable note by any means. Two cases have been decided, above referred to, in which defenses similar to

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the one set up here have been sustained. The first was an English case decided in 1869, while the other was decided a few months since by the Supreme Court of New York. The doctrine of the English and the New York cases was followed, and the judgment of the Circuit Court was reversed with costs.

[See the cases of *Clay vs. Schwab*, 1 *Mich. Nisi Prius*, 168, and *Longwell vs. Day*, *Id.*, 286.—*REP.*]

 THE PEOPLE *ex. rel.* ELI ROYCE *vs.* DANIEL GOODWIN.

Circuit Judges need not, necessarily, be residents of the Circuits for which they are elected.

Quo Warranto.

Opinion by CAMPBELL, C. J.—This was a proceeding to determine the right of Hon. Daniel Goodwin to exercise the functions of Circuit Judge of the Eleventh Judicial Circuit. Having pleaded his election and the determination by the Board of Canvassers in his favor, the Attorney General filed several replications, presenting a number of questions supposed to be material. These were demurred to except one, that offered an issue to the country on the question whether the respondent received the largest number of votes.

The principal question was whether the Constitution requires a Circuit Judge to reside in his Circuit. The provision relied on is section 22 of Art. 6, which declares that "when a Judge shall remove beyond the limits of the jurisdiction for which he was elected, or a Justice of the Peace from the township in which he was elected, or by a change in the boundaries of such township shall be placed without the same, they shall be deemed to have vacated their respective offices." By section seven it is provided that no alteration or increase of Circuits shall have the effect to remove a Judge from office.

Section 22 plainly declares that a Judge who resides in the Circuit shall, if he remove from it, vacate his office, but it does not in terms require him to reside within it, or prevent the election of one who resides elsewhere, and section seven contemplates the possibility of legislation which may put his residence outside of it.

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In *SOME* offices the necessity of residence arises from their very nature, and if the Constitution were silent upon this subject, only legislative interposition, and possibly not even that, could do away with the necessity of residence. Such are town officers and the ministerial officers of counties. The Constitution says nothing concerning most of these officers, and only provides for a special emergency concerning Justices. Probate Judges are included in the prohibition of section 22, and if that implies the necessity of residence, then no further provision would be necessary to compel it. But by section 13 of article 6, it is declared concerning each Judge of Probate, that "he shall be elected by the electors of the county in which he resides." So by section 4 of article 5, Senators and Representatives are required to be qualified electors in the respective counties and districts which they represent. At the common law, the electors of any precinct might choose their representatives at large. It seems clear that in cases which were doubtful it was deemed necessary to declare distinctly that incumbents should be residents. There being no such declaration in regard to Circuit Judges, the restriction, if it exists, must be found in the necessary incidents of the office or in some binding usage.

The Judges, when the Constitution was adopted, performed the same functions which had before devolved upon the Judges of the Supreme Court, who were elected or appointed at large. Their duties were performed partly in the Circuit and partly in the Supreme Courts which took them away from their Circuits. They could sit in any other Circuit when requested. They were not confined to locality in performing their duties, nor was their jurisdiction confined to local interests.

A consideration of the functions of Judges renders their independence of local affairs still more obvious. The judiciary is one of three co-ordinate branches of the government, and represents simply the law by which the people have agreed to bind themselves. Its services are all performed on behalf of the State, the sovereignty from which all law emanates. The Judges receive their salary from the State Treasury, and the only object in having local courts is to bring justice home to the people. And, as any Judge may lawfully sit anywhere, there is nothing whatever to make it important that he should reside in one place rather than another. By both the civil

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and the English law no Judge was allowed to sit in his own home or county at all to try criminal or civil cases. It is only during the present century that the restriction has been removed. As a matter of construction it was therefore concluded that the Constitution does not require residence.

It was further held that the Constitution does not permit the regularity of elections to the more important public offices to be tried by the courts. It is provided that in all cases where by the Constitution or by statute, the result is to be determined by the Board of State Canvassers, there shall be no judicial inquiry beyond their decision. It declares that "when the determination of the Board of State Canvassers is contested, the Legislature in joint convention, shall decide which person is elected." This provision was doubtless suggested by the difficulty of conducting an inquiry of this kind before the courts, and probably to discourage litigation in matters of election.

The result of these conclusions is that all the replications, except that relating to the residence, tender issues which are immaterial, because their determination cannot in any event change the Canvassers' certificate, which is in this controversy conclusive proof of the respondent's title to office. As the replications take no issue upon the existence of their determination, but distinctly admit it, and as there is no material issue of any kind tendered, the respondent is entitled to final judgment on the demurrer. He was also awarded costs against the relator.

EDWIN R. SEELY vs. HENRY HOWARD.

Description of lands in declaration in ejectment.

Error to St. Clair Circuit.

Opinion by GRAVES, J.—Seely brought ejectment, and in his declaration describes the premises as "the following real estate or premises situated in the city of Port Huron, county of St. Clair, and being known and described as the undivided eighth

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part of the lower West Brook farm, (so called), in section 15, town 6 north, range 17 east, lately conveyed by Frederick H. Vandenburg, trustee, to said Howard by deed dated April 15 1870, and recorded in liber 30, page 201, of deeds, in the office of the Register of Deeds for said county." Howard demurred to the declaration, and the Court awarded judgment in his favor. Seely now asks a review of this judgment. The main grounds of the demurrer are those which raise the question whether the premises are described with sufficient certainty.

Held, That the description was sufficiently precise without reference to the Vandenburg deed. The county and city are given, with the name of the tract of land, and it is clearly distinguished from all other pieces of land. Writers and the authorities hold this description sufficient. Inasmuch as the description was held sufficient, the reference to the Vandenburg deed was deemed immaterial in this relation.

Judgment reversed and a new trial ordered.

 WILLIAM H. BOOTHROYD vs. JOSEPH ENGLER.

Error to St. Clair Circuit.

Opinion by CAMPBELL, Ch. J.—The only question was whether the record of a deed purporting to be signed by *Harrison* Sherman, and certified to have been acknowledged by *Hiram* Sherman, (the latter name having been inserted in the beginning of the deed as that of the grantor,) could be received in evidence as the conveyance of Hiram Sherman, the original deed not being shown.

Our statutes now require every deed to be *signed and sealed* by the person from whom the estate or interest is intended to pass, as well as acknowledged by the person executing it. The signing can not be dispensed with, and no one but the signer can be regarded as the grantor. The presumption of law always is that a person uses his real name, and, in the absence of proof, a deed signed by *Harrison* and acknowledged by *Hiram* is signed and acknowledged by different persons. A person using an *alias* might, under some circumstances be estopped from denying the *alias*. But no such case is shown to exist here.

The judgment was correct and is affirmed with costs.

SUPPLEMENT.

Abstracts of Decisions of the Supreme Court, rendered at the April Term, 1871.

DEXTER A. BALLOU *vs.* WILBUR H. HILL *et. al.*

Suit was brought against two persons upon an award against them, the declaration showing the submission and award to have been joint. The suit as against one of them was discontinued, without any amendment being made to the declaration, though it was ordered that "the pleadings and proceedings be amended in accordance with such discontinuance." *Held*, That in such case the discontinuance as to one defendant worked a discontinuance as to both.

When an amendment is ordered or permitted, and is of such a nature that the record furnishes upon its face all the data for applying it, it may be considered as made, though no verbal changes are made in the pleadings, which are then to be read as if they had been actually amended.

Error to Bay Circuit.

Opinion by CAMPBELL, Ch. J.—Suit was brought upon an award against Dexter A. Ballou and Oren A. Ballou, alleged in the declaration to have been made on their joint submission.—In consequence of certain questions raised on the trial, a discontinuance was allowed to be, and was entered before the judgment as to Oren A. Ballou, and judgment was rendered against Dexter A. Ballou alone, without any further action than the recital in the order, "that the proceedings and pleadings in this case be and the same are hereby amended in conformity with such discontinuance, and that said suit proceed against Dexter A. Ballou, as though it had originally been commenced against him alone.

SPICER vs. SMITH.

Held, That when an amendment is ordered or permitted, and is of such a nature that the record furnishes upon its face all the data for applying it, it may be considered as made, though no verbal changes are made in the pleadings, which are then to be read as if they had been actually amended.

If, however, Dexter A. Ballou had been sued alone upon such a cause of action as is set forth in the declaration, the suit could not be maintained against him. The award is stated in the declaration to have been a joint one, made upon a joint submission. No sole action could be maintained upon such award, and a discontinuance against one defendant, leaving this joint award as the alleged cause of action, would be as fatal to the case as a discontinuance against both. There is nothing in the record from which any one can legally infer in what way the declaration should be amended, and this being so, the amendment cannot be inferred. Until made, the suit appears of record as a joint suit incapable of severance, and the discontinuance not being followed up by any amendment in fact, practically ended the case and rendered any judgment erroneous. The judgment cannot be upheld upon the declaration.

Judgment below reversed with costs of both courts.

FREDERICK SPICER vs. JARED A. SMITH.

Where suit is brought by the endorsee of a note which had been endorsed by an agent of the payee, in behalf of the payee, it is incumbent on the plaintiff to prove the authority of the agent, the endorsement and the ownership of the note.

Error to Eaton Circuit.

Opinion by GRAVES, J.—This was assumpsit, in which Smith declared against Spicer on the common counts, and set forth the copy of a note which was to be given in evidence. The following is a copy of the note :

“Post-office address, Eaton Rapids, county of Eaton, State of Michigan, Town of Hamlin, May 12, 1869.
\$150.

SPICER vs. SMITH.

Five months after date I promise to pay to the order of Perkins & Chilson, one hundred and fifty dollars for value received with use.
(Stamp.) Signed, FREDERICK SPICER."

On the back of the note was the following endorsement: "Pay to the order of Jared A. Smith. Perkins & Chilson, by H. H. Blair, agent."

The general issue having been pleaded, the parties proceeded to trial before a jury, when Smith gave evidence tending to show that the note was purchased before its maturity by him through his agent, for value, in the belief that there was no defence to it, and without notice of any objection to its validity. No affidavit having been made denying the execution of the note, it was then offered in evidence, when Spicer's counsel opposed its admission on the ground, first, that the endorsement by the payees had not been proved, and, second, because the authority of the agent by whom the endorsement purported to have been made had not been shown. The Court overruled the objection and admitted the note.

It was claimed for defendant in error that no proof of the endorsement was required, because neither the execution of such endorsement or the authority of Blair had been denied upon plea or upon oath, and reference was made to sections 3,714 and 3,767 *Compiled Laws*, and also to Rule 79 of the Circuit Court.

Held, That the statutes cited have no application to cases originating in the Circuit Court, and if they had, they would furnish no support to the position taken. In this case the endorsee was not a party, nor was the endorsement as a ground of liability in any way involved. If the plaintiff had set forth his cause of action specially, he must have alleged the making of the note and its transfer to himself and must have proved each in the absence of any rule excusing it. By allowing the note to be given in evidence under the money counts the statute has not made the proof of these facts unnecessary. The rule, however, has provided that as against the alleged maker in a suit by the endorsee, payee or holder, the plaintiff shall not be put to proof of the execution of the instrument unless it is denied on oath, but the necessity for proving the title of the plaintiff through an alleged endorsement is neither removed or lessened. In this case the defendant did not deny the making of the note. But the plaintiff's title was likewise in issue and, as the rule had no relation to

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that, it was incumbent on the plaintiff to prove it. In this case it was incumbent upon the plaintiff to prove that the endorsement was made by Blair and that he had authority, and the admission of the note without evidence of plaintiff's title was error. Judgment reversed with costs, and a new trial ordered.

FRACTIONAL SCHOOL DISTRICT No. 4 OF MACOMB AND CHESTERFIELD vs. CHARLES A. MALLORY.

Order of School Directors upon Treasurer held void, not having been drawn upon Assessor and countersigned by Moderator.

Error to Macomb Circuit.

Opinion by CHRISTIANCY J.—Mallory brought assumpsit in a Justice's Court against the district on the following order :

"Treasurer of the Township of Macomb, County of Macomb :

On the first day of February, 1866, pay Adams, Blackman & Lyon, or bearer, the sum of thirty-three dollars out of the expense fund belonging to District No. 4, fractional townships of Macomb and Chesterfield, for teacher's daily register, school district record, and other school blanks purchased by the undersigned for the use of said district, with use at ten per cent. from date until paid.

WILLIAM GAMBER, Director.

Countersigned,

LANCEY WESTON, Moderator."

The funds in the hands of the Township Treasurer, upon which the order was drawn, were raised by tax for the district and collected by the Treasurer. The defendant on the trial before the Justice, objected to the reception of the order, but the objection was overruled and the plaintiff recovered judgment for the amount of the order, with interest and costs. The judgment was removed to the Circuit and affirmed. Thence it was taken to the Supreme Court.

Held, That the order was void upon its face. The Director had no power to draw any order on the township Treasurer for any money of the district in his hands payable to anyone but the district As-

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essor, who is the disbursing officer of the district. Debts of and claims against the district (like that indicated by this order,) are to be paid by orders drawn by the director upon the Assessor and countersigned by the Moderator. *C. L.*, Secs. 2272, 2275 and 2296.—These sections were in force when this question came up and the amendment of 1869, (p. 183, note,) renders the matter still more clear.

Judgment below reversed, and defendant in error to recover costs in all the courts.

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Where a person injured a structure of plank, in the bank of a river in a place where the bank had been washed away by a freshet, such structure not extending across the river, or the natural current thereof, *Held*, that such person is not liable under the provisions of the statute, *C. L.*, § 5790, against injuring and destroying dams, reservoirs, canals, &c. The structure referred to is not to be treated as a dam within the meaning of this statute.

Error to Hillsdale Circuit.

Opinion by CAMPBELL, C. J.—This was an information against the defendant for a supposed offense against the provisions of section 5790 of the *Compiled Laws*. The section provides for the punishment of any person who shall wilfully and maliciously break down, injure remove or destroy any dam, reservoir, canal or trench, or any of the wheels or machinery of any mill, or shall wilfully or wantonly without color of right draw off the water contained in any mill pond, reservoir canal or trench. The information charged the defendant in different counts with having wilfully and maliciously broken down, injured removed and destroyed the dam of a certain water mill of one Luther Tyler, in the township of Scipio, and with having wantonly drawn off the water contained in the mill pond of a certain water mill in the possession of said Tyler in Scipio aforesaid.

The Circuit Judge returned that there was no evidence to sustain the latter charge, but a general verdict seems to have been found on all the counts. The bill of exceptions showed that counsel for the people gave evidence tending to show that defendant about October 11, 1869, injured a structure of plank, built in the bank upon the Kal-

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amazon River, in a place where the bank had been carried away by former freshets or inundations, and that the said structure was not erected across the channel. The defence requested the Court to charge the jury "that the jury cannot convict the defendant unless they find from the evidence that the structure of plank destroyed or injured was placed across the current of the original and natural current of the river, to obstruct or prevent the natural flow of the water and along said natural channel, and that they must acquit the defendant if they find from the evidence that such planks were placed in the bank of the river to retain and fill up an opening in such bank made by former freshets and inundations and to prevent the same results from future freshets or inundations." This was refused.

Held, That the request should have been given, as the structure indicated was not a dam within the meaning of the statute. This structure was simply built to repair a defect in the river bank, and it was not even a part of a dam. The verdict was set aside and a *nolle prosequi* ordered entered as to the defendant, as he was entitled to acquittal on all the counts.

OLIVER H. P. GREEN vs. WILLIAM BROOKINS.

G induced B to subscribe for shares in a patent right, and to give his note for \$500, under the promise that G would find a man to take the shares and pay the amount of the note therefor. G failed to find a party to take the shares. B paid the notes, with the knowledge of G, and brought suit against G. G contended that the promise was void, under the statute that declares that every special promise to answer for the debt, default, &c., of another shall be void unless in writing; and second that it was void under the provisions of the statute respecting the sale of goods for the price of \$50 or more. *Held*, That the promise was not within either of these statutes. *Held also*, That though the payment of the note was voluntary, G's approval of such payment, was an admission that there was no defense to the note.

A general objection to the charge of the Court does not come within the rule requiring assignments of error to be special.

Error to Oakland Circuit.

Opinion by GRAVES, J.—Brookins sued Green to recover damages for breach of a verbal contract. The entire evidence was given

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under the two special counts. The first stated that Green claimed to have an interest in a hay fork patent, and was about to organize a company for the purpose of dealing in the fork and in rights under the patent, and promised Brookins that in consideration that he would become a member of the company, and take two shares at \$250 each, and in payment therefor give his promissory note, such shares should not cost him anything, and that he, (Green,) as soon as the company should be organized would find a man who would buy the shares and take them off Brookins' hands and pay him the amount of the note, and that Brookins should not be put to any cost or expense on account of the shares or the note. It is then averred that Brookins, confiding in Green's promise, did subscribe for shares, gave his note for \$500, etc., and that Green refused to find a man to take the shares and pay the amount of the note, and that Brookins had been required to pay it, and had so done, etc.—The second special count was substantially like the first, except that the agreement on the part of Green was laid as a promise to Brookins to indemnify and save him harmless from all damages on account of the note, if he should give it.

The requests of plaintiff raise two questions under the statute of frauds. Plaintiff insists, first, that the contract between the parties being wholly verbal, was void under that provision that declares every special promise to answer for the debt, default, or misdoing of another person, shall be void unless in writing; and second, that it was also void under the provision respecting the sale of "goods, wares and merchandise for the price of \$50 or more." The promise in this case, by Green, as alleged in the declaration, was not collateral, not an undertaking in relation to the doing or misdoing of any third person. It was a promise by Green to Brookins to find some one to take his place as member of the company, and to save Brookins from expense and damage in consequence of becoming shareholder, giving his note, etc.

Held, That a promise of that description is not within the statute

Held also, That the agreement by which Green was to find a man to take stock to be thereafter credited, in a company to be thereafter organized, was not an agreement on the part of Green to buy goods, wares or merchandise, within the meaning of the statute.

ATLAS MINING Co., vs. JOHNSTON.

The sixth error raises the objection that this payment of the note, or part thereof by Brookins was voluntary, and, therefore, not evidence of damage under the agreement of Green to indemnify him.

Held, That this position is rendered untenable by the circumstance that the note was taken up by Brookins with the knowledge and approbation of Green. When Green approved of the payment he virtually admitted to Brookins that there was no ground for refusing, and if there was none, he had no defense on the ground of payment without coercion.

There was a general objection to the charge of the Court to the jury, but without specifying in what particulars it was objectionable.

Held, That this assignment does not come within the rule which requires every assignment of error to be special; furthermore, that the advice to the jury was quite as favorable to the plaintiff as the law of the case would justify, and as there are no errors in the same, the judgment of the Circuit Court must be affirmed with costs.

THE ATLAS MINING COMPANY vs. JAMES R. JOHNSTON.

It is no ground of error that the Court is more cautious and strict in securing an impartial jury than the law actually requires, and for this purpose the Courts may very properly reject a juror on a ground which would not be strictly sufficient to sustain a challenge for cause.

Error to Keweenaw Circuit.

Opinion by CHRISTIANCY, J.—The first three alleged errors relate to the setting aside of two jurors by the Court and the excusing of a third. After the jurors had been drawn, plaintiff's counsel asked one of them whether he was a brother to defendant, to which he replied in the affirmative; also whether he had talked with his brother about the case, to which he replied, "Last night I spoke to him about it, but he would give me no answer." The Court thereupon set him aside, plaintiff's counsel not asking it. Another juror was asked by plaintiff's counsel whether he had any bias or prejudice in favor of either party, to which he replied, "I have formed some opinion," whereupon the

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Court, without any objection from either party, set him aside. Another juror called in the place of the latter, stated to the Court that he did not understand the English language, and the Court, remarking that from previous intercourse with said juror he knew that he was deaf and did not sufficiently understand the English language, excused him. No challenge or objection was taken by either party. Defendant's counsel, however, claims the right to examine all the above jurors as to their competency, but was prevented by the Court in the manner above stated. Defendant insisted that he was entitled as a matter of right, to have the case tried by the twelve jurors first drawn, and not challenged peremptorily, or challenged for sufficient cause, and the challenge sustained, and that there was not only no challenge, but no sufficient ground for a challenge for cause. He relied upon section 4392, *C. L.*, which provides that "the twelve persons who shall appear as their names are drawn and called, and shall be approved as indifferent between the parties shall serve, and shall be the jury to try the cause."

Held, That this statute will not bear the construction thus put upon it. It would take from the Court the power to excuse a juror, however urgent the cause. The first two jurors in this case may be properly said not to have been approved as in different between the parties. It is no ground of error that the Court is more cautious and strict in securing an impartial jury than the law actually requires, and for this purpose the courts may very properly reject a juror on a ground which would not be strictly sufficient to sustain a challenge for cause. As to the juror who did not understand the English language, it would have been highly improper for him to sit in the cause, although unchallenged.

WILLIAM N. OSMAN vs. NATHANIEL TRAPHAGEN.

In July, 1847, A and B, as administrators of an estate, are licensed to sell two parcels of land. A gave the bond and took the oath required by law, but B declined to qualify. A sold the two parcels together, June 17, 1848, and made his report of sale which was confirmed June 4, 1849. A executed a deed to the purchaser and received the last of the purchase

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money. Subsequently both administrators filed their accounts which were allowed. In a suit in ejectment by the heir of decedent against one holding by ~~mesne~~ conveyances under the administrator's sale, *Held*,

1. The omission to sell in parcels was a mere irregularity, not to be attacked collaterally.
2. The statute does not require the purchase money to be paid before the deed is given. The administrator may give credit for not more than three years on three-fourths of the purchase money.
3. The omission to give a deed within one year from the date of order of sale cannot be urged against the title.
4. The non-joinder of the administrator, who failed to qualify, in the sale and conveyance can not be urged against the title.

Error to Oakland Circuit.

Opinion by GRAVES, J.—This was an action of ejectment by Traphagen to recover two separate parcels of land in Oakland County. The case was tried without a jury, and the facts found that in September, 1846, Nathaniel Traphagen, the father of defendant, died seized of the land, leaving Mary Traphagen, his widow, and the defendant, his son and only heir. Letters of administration were issued to the widow and to Abraham A. Traphagen, the father of decedent, who regularly qualified and entered upon the trust, and continued in office until the estate was settled. The land in question was appraised at \$400, and demands allowed by the Judge of Probate, acting as commissioner, against the estate to \$477 61.—After deducting the authorized allowances no personal property remained to pay the debts, and the administratrix and administrator applied in November, 1847, for a license to sell the real estate, which was duly granted in July of that year, and which directed the order of sale of the several parcels. The administratrix refused to proceed any farther in the matter of sale after the obtainment of the license, whereupon the administrator went on and gave the required bond and took the oath, advertised the premises to be sold at a specified and proper time and place, and sold the two parcels at one bid, subject to the widow's right of dower, to Margaret A. Miller for \$225. This sale occurred June 17, 1848, the widow then residing on the premises and by her attorney forbidding the sale.—Two days thereafter the Judge of Probate duly confirmed the sale, and on the 4th of June, 1849, the administrator conveyed the premises to the purchaser, and received the last of the consideration money. The administrator and administratrix filed their accounts with the Judge of Probate, by whom they were allowed, *Subse.*

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quently Margaret A. Miller, the purchaser, and her husband, conveyed the premises by warranty deed to the said Abraham H. Traphagen, who afterward, by like conveyance, transferred them to plaintiff, he being a purchaser in good faith for valuable consideration, and with no actual knowledge of the alleged facts, and he was in possession, claiming title when and before the suit was commenced.

The Court below, found as a matter of law, that the execution of the deed was defective, because only one of the administrators signed and executed it, wherefore it was a case of defective execution of a power which could not be remedied on the law side of the Court. Judgment was accordingly given for defendant.

The defendant insists that the sale was irregular and void ; first, because the sale and conveyance were by only one of the two representatives, when the license was given to two ; second, because two separate and distinct parcels were sold at one bid ; third, because the sum bid was not paid in full before the deed was given ; fourth, because the deed was not delivered within a year from the sale.

Held, That if the two parcels were sold together, the sale was not made void thereby. That fact went no farther by way of impairing the sale than to make it voidable at the instance of some one aggrieved, and in a direct proceeding in the Probate Court or upon appeal. The omission to sell in parcels will be treated as a mere irregularity which cannot be resorted to to invalidate the sale when attacked collaterally.

Held also, That the statute does not require the purchase money to be paid before the deed is given. The administrator is allowed to give credit for not more than three years on three-fourths of the purchase price.

Held further, That the omission to give a deed within a year from the order cannot be urged against the title. That question is settled in *Howard vs. Moore*, 2 Mich., 226.

Held further, That the non-joinder of the administratrix did not nullify the sale. She never qualified in reference to such sale, and therefore could not act. The sale was that of the administrator, and he was the only person competent to make it. It was duly confirmed by the Probate Judge, who in such confirmation passed upon the question of its legality.

The judgment must be reversed with costs and a new trial ordered.

STEWART vs. THE PEOPLE

HENRY STEWART vs. THE PEOPLE.

The mere fact that a juror entertains the belief that the crime with which the respondent is accused has been committed by some one, without any belief as to the guilt of the accused is not a good ground for challenge.

Though, as a general rule, after an attempt to impeach a witness by showing that he has made statements out of Court inconsistent with those sworn to, his testimony cannot be supported by the testimony of witnesses who show that on other occasions his account of the transaction corresponded with that given in Court, yet a Circuit Judge is allowed a reasonable discretion in such cases, and the exercise of that discretion will not be set aside or interfered with except in a clear case of abuse.

The fact that a respondent consents to a sealed verdict does not preclude him from the inquiries that would otherwise be admissible in polling the jury.

A juror was summoned as a talesman. After verdict, on a motion for a new trial, the question as to this juror's competency was raised, on the ground that his name did not appear on the assessment roll. *Held*, That the statute does not render one incompetent to act as a juror because he is not assessed for taxation.

Error to Bay Circuit.

Opinion by COOLEY, J.—A juror named Parmely was challenged and the challenge overruled. The challenge was not based upon the ground that he had any bias or prejudice against the prisoner, or that he had formed any opinion, or received any impression of the prisoner's guilt; but it had for its sole foundation the juror's belief that the crime charged had been committed by some one else.

Held, That there was no error in this ruling. The rules on this subject must be reasonable. An intelligent jury is as important to a correct conclusion as one free from preconceived impressions; but it would be impossible in a great many cases to summon twelve men of intelligence who were in the habit of availing themselves of the information on public affairs to be obtained from the usual channels who would at the same time be free from any opinion regarding the commission of the offense.

Held, further, That the objection, that the loss of the Chicago letter, mentioned in the record was not sufficiently established to admit of the introduction of parol evidence of its contents was not well taken.

The most important question is whether the letter itself, if produced would have been competent evidence. The writer of it was

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the principal witness against the prisoner, and had testified to a conversation had with him in Chicago, in which the prisoner made statements in regard to his participation in this offence. On cross-examination he was asked whether he did not have a conversation with Edward O'Connor, Robert McKinney and Michael Kilduff, on the morning during the examination of the prisoner before the Justice, in which he told them that the prisoner was not the man with whom he had the conversation at Chicago, and he replied in the negative. He stated, however, that McKinney, Kilduff, and one Hamilton, were his bail on a criminal charge pending against him when Stewart was arrested, and that O'Connor, Kilduff and McKinney came to his house and told him if he gave evidence against Stewart they would throw up his bail. He did give such evidence and was surrendered by his bail as they had threatened. These three persons were then called by the defense, and testified that the witness did say to them at the time inquired about, that the prisoner was not the man with whom he had the conversation in Chicago. In reply to this the prosecution claimed the right to put in evidence the letter in question, which was written by the witness in Chicago to his brother in Bay City, after the time of the alleged conversation with the prisoner in Chicago, and which spoke of the prisoner being there and said, "if you want him, send word." The prosecution also offered to show by the jailer that before the prisoner was arrested, and before there was any talk of arresting him, the witness had made to him the same statement in regard to the conversation at Chicago which he had sworn to in Court. The Circuit Judge admitted this evidence and the defense excepted. The question appears to be whether, after an attempt to impeach a witness by showing that he had made out of Court statements inconsistent with those sworn to, his evidence can be supported by the testimony of witnesses, who show that on other occasions his account of the transaction corresponded with that given in Court.

Held, That if it were an established fact that the witness had made the contradictory statement, the supporting evidence here offered was not admissible. But in these cases the evidence of contradictory statements is not received until the witness has denied making them, so that an issue is always made between the witness sought to be impeached and the witnesses impeaching him. The

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jury, therefore, before they can determine how much the contradictory statements ought to shape the credit of the witnesses are required first to find from conflicting evidence whether he made them or not, and the question is whether upon an issue like this the evidence like that received by the Court below was admissible. It is impossible to lay down any arbitrary rule applicable to every case, but there are some cases in which the peculiar circumstances would render this piece of evidence important and forcible. The Circuit Judge ought to be allowed a reasonable discretion in such cases; and though such evidence should not generally be received, yet his discretion ought not to be set aside except in a clear case, such as did not exist here.

The prisoner had consented to a sealed verdict, and one having been returned accordingly, he was precluded from the inquiries that would otherwise have been admissible in polling the jury, because of this consent.

Held, That this ruling was erroneous. There is no safe ground for denying to the prisoner the same right to have the jury polled in cases where he consents to have a sealed verdict which is conceded to exist in all other cases. The juror is not estopped by his signature to the sealed verdict from refusing his assent to the verdict when returned in open court. The sealed verdict is assented to only as a matter of convenience, and the prisoner has no reason to understand that he thereby waives any substantial right or deprives himself of the privilege of determining, on the most conclusive evidence, that the verdict the jurors return is one which has the solemn and deliberate assent of all.

Another question raised was whether the Circuit Court erred in refusing to grant a new trial on the ground that after the verdict it was discovered that one of the jurors who was summoned as a talesman, was not named on any of the assessment rolls for the county either for the year in which the trial took place or for any preceding year.

Held, That there was no error in such refusal. The statute does not render one incompetent to act as a juror because he is not assessed for taxation. The selection of persons to be returned as jurors is to be made from the assessment rolls; but the qualifications required are only those of electors, and when once returned

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the names remain in the box until others are required in their places, whether they appear upon the successive assessment rolls or not. Taxsmen are to be summoned from the bystanders in court or from the neighboring citizens, and there is no occasion for inquiring whether their names appear upon the assessment rolls or not.

Judgment below reversed and a new trial ordered.

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... computing time with reference to the statute of limitations as applied to actions upon judgments, *Acid*, that the day of entering the judgment should be excluded.

Case made.

Opinion by COOLEY, J.—This action was brought on a judgment rendered in a court of record, March 15, 1859. It was commenced by summons March 15, 1869, and the question is, whether the action is not barred by the statute of limitations. This statute provides that every action upon such judgment shall be brought within ten years next after judgment was entered and not afterwards. If in computing the time, the day on which the judgment was entered, is to be included, then the action is brought too late, but, if that day is excluded, it is conceded that the summons was taken out in due season.

This question has been very fully examined in the reported cases, and the courts have come to widely different conclusions.—The Court concur in the rule of Sir William Grant, in treating the day of the action or event as a point of time only, and excluding it altogether from the computation. This rule coincides with that adopted under rules of practice, which is always exclusive of the first day, unless the peculiar wording of the rule would include it.

The decision of the Circuit Court is deemed correct, and its judgment is affirmed with costs.

HILL vs. ROBBINS.—FISHER vs. FORBES.

HILL vs. ROBBINS.

Error to Oakland Circuit.

The decision of this case at the Circuit is reported at length in 1 *Mich. Nisi Prius*, 305. The judgment of the Court below is affirmed.

FISHER vs. FORBES.

Error to Oakland Circuit.

The statute against resulting trusts, applies only to those cases in which the deed is taken by a party other than the one furnishing the consideration, *with the consent of the latter*

Opinion by COOLEY, J.—In the fall of 1854, complainant resided in Bennington, N. Y., on a parcel of land which he had purchased of the Holland Land Company, and on which he was then owing some \$1,300, which he was unable to pay. The company had sent an officer to remove him from the premises, when one Stillman Goodenough, the complainant's brother-in-law, intervened and succeeded in obtaining two week's time in which to arrange the matter. He arranged with one Patchin to re-exchange for complainant's interest in the property, an 80 acre lot in Milford, Oakland County, Mich. The deed from Patchin ran to Goodenough as grantee, and complainant does not seem to have objected to it. He took possession, however, claiming the land as his own, and has since been in possession and made valuable improvements.

Goodenough conveyed the land, it seems, to his brother in 1855, on an understanding, as he claims, that the title should still be held by complainant. There have been several subsequent conveyances until defendant has got the title and claims to be a grantee for value and in good faith. It is, however, not claimed that he possesses any greater equities than did Stillman Goodenough, and the complainant's possession was notice of his title. Complainant now claims

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that the conveyance to Goodenough was against his will and in fraud of his rights and seeks to gain the title for himself, while defendant insists that complainant assented to the conveyance, and that under our statute there is no resulting trust in his favor.

Held, That the statute applies only to those cases in which the deed is taken to a party other than the one furnishing the consideration, *with the consent of the latter*. From the facts which appear in this case it appears that Goodenough was acting in the interest of complainant and as his agent. He should therefore have had the deed made out to him or a trust clearly declared., so that it could be legally enforced.

The decree was correct and was affirmed with costs.

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Error to Wayne Circuit.

Section 25, of the Bankruptcy Act, makes certain payments void, when made to prefer a creditor, &c. A being insolvent, gave his note endorsed by B to a creditor. In a suit against the endorser, *Held*, that the note was valid, and was not to be treated as a payment within the meaning of the act.

Opinion by COOLEY, J.—This was a writ of error brought on a judgment rendered against O'Connor in the Court below as endorser of a note made by McKinney & Co. The sole defense was that the note was made by McKinney & Co., and accepted by the Parkers in payment of a precedent debt, with the knowledge on the part of all the parties that McKinney & Co. were insolvent; that the giving of the note was with a view to prefer the Parkers as creditors; that McKinney & Co. were soon after proceeded against and declared bankrupts, and that by reason of these facts the note and endorsement were altogether void. The Circuit Court held these facts to constitute no defense, and the Supreme Court affirm that decision.

The argument of plaintiff in error was that section 25 of the Bankrupt act makes certain payments void when made to prefer a creditor or to defeat the policy of the act, and the giving of this note it was said was such a payment. The Court, however, held other-

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wise, considering that the payments mentioned in the act were those which reduced the means of the debtor and diminished his capability of paying his creditors ratably; not the mere changing the form of an obligation from an account to a note.

Judgment affirmed.

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Error to Washtenaw Circuit.

A entered into a written agreement to exchange lands with the trustees of a Church, the proper conveyances to be made as soon as the trustees could get legal authority to act. On the same day he gave verbal permission to the trustees to enter upon the land he was to convey, and to build sheds. The fence was set back and sheds built. Some fifteen months afterwards, A moved back his fence so as to include the sheds, and the trustees, a few days later removed the fence and took off the sheds, &c. *Held*, That there was no right of possession secured under this contract for the exchange of lands. The whole matter was contingent upon the society having the right to act. There was no connection between the formal license and the written contract. The rights of the trustees must have rested on the parol license, whatever they may have been, and a parol license is revocable at any time.

In actions of trespass to lands it is proper to give in evidence acts showing the disposition with which the trespass is committed.

Opinion by CAMPBELL, C. J.—Plaintiff brought trespass against defendants for breaking his close and committing various grievances, including the removal of certain fences and sheds, and an imprisonment of his person. Defendants under the general issue gave notice of defense, and also of title in a Baptist Church of which they were trustees, and as such did the acts in question. It appeared that the plaintiff owned a farm adjoining the church lot, and November 29, 1867, entered into a contract purporting to be with the trustees, whereby, as soon as the latter could get legal authority to act, plaintiff was to deed, by warranty deed, to the church the lot they occupied, and a part of his adjacent premises, and the church was to quit-claim to him the half quarter section, including the farm and church premises, and agreed to occupy the land deeded by him for church purposes, parsonages, sheds, &c., to build their erections at certain places, and not to sell the premises for any other purposes except for farming.

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On the same day plaintiff gave verbal permission to build horse sheds on that part of his land which was ultimately to be conveyed to the church, and the parties set back the fence and began to prepare the land and had got the sills laid upon the ground when further work was suspended by reason of the cold. In April it was about to be resumed, when, according to plaintiff's proofs, he revoked his permission and refused to allow anything more to be done. The parties, however, went on and built their sheds. Some fifteen months thereafter, plaintiff moved back his fence so as to include the sheds, and a few days after the defendants took down the fences, removed the sheds, and committed the trespasses complained of. There were 17 sheds and they were for the individual use of such as paid for them.

The principal error assigned related first, to the rulings of the Court, touching the respective rights of the parties concerning the premises in question; second, to the elements which might enter into the case as causes of damage.

The Court below held that if the sheds were built by plaintiff's permission for the uses contemplated, they and the land in front of them necessary for access were in the possession of the church, and plaintiff could get no lawful possession again except by voluntary surrender or upon legal process, and that any other taking of possession would make him a wrong doer. That the trustees might lawfully remove the fence, and take off the sheds without becoming trespassers. It was further held that if the trustees entered the land and erected the sheds under or upon the conditions of the contract to exchange lands, which was afterwards reduced to writing, then by the terms of that contract it was the duty of the plaintiff to tender to the trustees a deed of conveyance of the premises, so as to offer to perform on his part before taking steps to revoke the license or gain possession of the lands where the sheds were.

Held, That there was no right of possession secured under this contract for the exchange of lands. The whole matter was contingent upon the society having the right to act. There was no connection between the formal license and the written contract. The rights of the trustees must have rested on the parol license, what-

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ever they may have been, and a parol license is revocable at any time. The verdict, finding the defendants trespassers must rest on the absence or revocation of the license; and, if revoked, it was before the sheds were built, and the lapse of time between the revocation and the trespass exceeded any possible term required by season or necessity to remove them, and whether they were liable for their value or not they were no less trespassers. The Court was not called upon, therefore, to pass upon these proprietary questions.—The case was thought not to be distinguishable from that of a license to go upon Fair grounds or other places of lawful resort on occasions when they are in use for specific purposes. It was deemed evident that the rulings of the Court were all made upon the assumption that the permission was lawfully connected with the written contract. The entire theory was based on insufficient grounds, and the rulings were erroneous.

It was alleged as error that parol proof was admitted that certain of the defendants were acting trustees of the church. But the rule was considered settled that except for some peculiar purposes, such evidence is sufficient. The Court could not try titles to office in any such litigation as the present.

It was charged as error that testimony was excluded as showing the disposition and spirit with which the trespass was committed and the malicious arrest of the plaintiff, to get him out of the way, while the trespass was to be consummated.

On the argument it was admitted that these circumstances should have been shown, except as to the arrest of the plaintiff, which it was claimed, would have been a ground of action by itself and therefore should not have been considered.

Held, however, that the authorities clearly recognize the right to recover for such an injury done in connection with the wrongful intrusion as an act of aggravation, in actions for trespass to lands.—The decision of the Court was erroneous in this respect.

There was error also regarding the question of costs. The statute gives costs to the plaintiff, who recovers any sum in trespass, however small, where the title to lands or tenements, or a right of way, or a right by prescription or otherwise to any easement in any land, or to overflow the same, or to do any other injury thereto, shall have been put in issue by the pleadings, or shall have come in

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question on the trial of the cause. Both title and license were set p, and each is within the clear intent of the statute.

Judgment reversed and a new trial ordered.

GROVIER vs. HALL.

An administrator who fails to inventory property, knowing the same to belong to the estate of the decedent, but treats the same as the property of decedent's widow, the Probate Judge approving and allowing alleged equitable claims in her favor, equal in amount to the value of such property, and allowing the final account of the administrator and ordering and discharging him from liability on his bond, *Held*, That the administrator could not be heard to say against heirs and next of kin on final accounting, that a decision of this sort was unimpeachable. If he had possession of funds which he knew belonged to the estate or which he had reason to believe so belonged, his omission to place them on the inventory will not excuse him from accounting for them.

agreement of jury—Decision by Court on the evidence produced before Jury, irregular .

Error to Macomb Circuit.

Opinion by GRAVES, J.—This was an appeal by the plaintiff in error, as one of the next of kin and heirs at law of decedent, from an order of the Judge of Probate, of June 9, 1865, allowing the final account of Hall as administrator, and discharging him from liability upon his bond to the estate. The parties agreed upon issues which confined the accounting to certain bank stock which stood in the name of decedent, to moneys received by Hall from the widow of decedent and to a claim of interest.

These items were not put upon the inventory, and it was claimed by plaintiff in error that these moneys and the proceeds of the bank stock, together with some interest, were assets of the estate, and were chargeable against Hall in his account. The respondent claimed that these effects were all treated as the property of the widow; that the Judge of Probate had allowed \$24,000 of claims against the estate, which were in equity the property of the widow; and that the supposed assets in question were regarded as her own under the circumstances. No commissioners were appointed to pass upon claims, so far as can be gathered from the record, and the

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Judge of Probate performed the duties of commissioners, and made the allowance now said to be in favor of the widow.

On the trial, evidence was given to show that the widow and administrator were brother and sister; that after her husband's death the widow delivered to her brother some \$1,400, of which \$1,000 was taken from the private trunk of decedent; \$200 received from a debtor, and the residue was derived from a sale of bank stock. Also, that the administrator knew whence these securities came, and that, on their receipt, he gave to the widow securities running to her individually, and which are still unpaid.

Respondent gave evidence tending to show that in June, 1851, the Probate Judge allowed claims against the estate in favor of several parties, for the benefit of the widow to the amount of about \$200; that the widow had treated the moneys as her own, and had lent them to respondent on securities running to herself; that plaintiff in error knew of such dealing, and of the source from which the funds were derived, and as agent of the widow, had collected interest on the securities given to her. To rebut this, plaintiff in error offered to prove that he had not collected anything on said securities since coming of age, and that the claims allowed against the estate were purchased with the proceeds of the estate by the administrator, and assigned to the widow without his knowledge or consent.

This evidence was excluded on objection by defendant in error, that the award of the Probate Judge could not be impeached. *Held*, That the administrator could not be heard to say against heirs and next of kin on final accounting; that a decision of this sort was unimpeachable. If he had possession of funds which he knew belonged to the estate, or which he had reason to believe so belonged, his omission to place them on the inventory will not excuse him from accounting for them and he cannot defend himself on the ground that he had regarded them or treated them as lent.

The jury were sent out below to find a verdict. While they were gone defendant in error moved the Court to decide the case without a jury, on the ground that the issues were by law properly triable by the Court alone. The jury disagreed and

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the Court refused the motion. Afterwards, and upon the evidence before the jury, the Court affirmed the order of the Judge of Probate. The parties consented that the evidence need not be retaken. *Held*, That the Court should have empaneled a new jury, the case involving issues of fact, as well as of law.

The order of the Circuit Court affirming that of the Probate Judge, was reversed with costs and a new trial ordered.

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The Court will take judicial notice as to who is Deputy Auditor General; and his endorsement on a County Treasurer's bond of the words, "Official bond of H. Johr, County Treasurer of St. Clair County, to the Auditor General, 1865 and 1866. \$20,000. Recorded and filed May 30, 1865. S. D. Bingham, Deputy Auditor General," will be held as an acceptance and approval by the Auditor General.

A County Treasurer neglected to have his bond approved by certain officers indicated by statute. On a suit on the bond in behalf of the People, to recover the proceeds of sales for delinquent taxes, *Held*, That the Treasurer, who on the faith of the bond was allowed to make the sales and secure the money, and his sureties, could not afterwards be heard to make the objection that the bond executed by them and accepted by the Auditor General, was not approved by the officers required by statute. The additional precautions provided were intended solely for the benefit of the State, not at all for the benefit of the defendant or his sureties.

Error to St. Clair Circuit.

Opinion by CHRISTIANCY, J.—This was an action of debt brought in the name of the people against Johr and his sureties, on a bond given by Johr, as County Treasurer of St. Clair County, to the Auditor General, conditioned for accounting for all moneys paid to him for sales of lands for taxes at the annual tax sales in said county. The declaration alleges the non-payment of \$7,490 88 received for the sales of 1866. It was admitted that he had that amount in his possession November 2, 1866.

The bond appears to have been approved by one Circuit Court Commissioner of said county, and this approval only was alleged in the declaration. There was no approval by the Prosecuting Attorney or other commissioner, nor was there any ex-

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press approval by the Auditor General upon the bond, but it contained the following endorsement: "Official bond of H. Johr, Treasurer of St. Clair County, to the Auditor General, 1865 and 1866. \$20,000. Recorded and filed May 30, 1865.—S. D. Bingham, Deputy Auditor General."

On the trial the bond was first admitted, subject to objection. Defendant then offered to show that Johr had been robbed of the money, which offer was rejected by the Court — The bond was then excluded on the ground that it was not executed and approved according to the statute. It was therefore held that the action could not be maintained, and this is the main question on the appeal.

It was, however, first held that, so far as the purposes of this suit went, it must be considered that the bond had been delivered. It would be fair to presume that, as the statute requires it before the County Treasurer sells lands, and this Treasurer did undoubtedly sell. Besides, defendant did not file any affidavit denying the execution of the bond, according to Rule 79 of the Circuit Court. Further, it was held that the Court would take judicial notice that S. D. Bingham was Deputy Auditor General and that his endorsement had the same validity as if signed by the Auditor General himself. It also shows an approval and acceptance by the Auditor General himself.

It was admitted by the Court for the purposes of the case that, unless the bond could be treated as a statute bond, it should have been declared on in the name of the obligee, not in that of the People. It was further considered that the Auditor General might have refused the bond without the approval of the officers above mentioned, and have ordered some person other than the County Treasurer, to make the sales; as between the County Treasurer and the People, it was probably his duty so to do.

It was, however, held that the Treasurer, who on the faith of the bond was allowed to make the sales and secure the money, and his sureties, could not afterwards be heard to make the objection that the bond executed by them and accepted by the Auditor General, was not approved by the officers required by statute. The additional precautions provided were intended solely for the benefit of the State, not at all for the benefit of the defendant or his sureties.

Judge Christiancy examined the authorities upon the question and found that all sustained this view of the case, except an ill considered case in 6 *Georgia*. The bond was therefore ordered to be treated as a statute bond, the judgment of the Court below was reversed and a new trial ordered.

SUPPLEMENT.

Abstracts of Decisions of the Supreme Court, rendered at the April Term, 1871.

TENENT vs. THE MUSKEGON BOOMING COMPANY.

Bill in equity dismissed, it appearing that complainant has an adequate remedy at law. .

Appeal from Muskegon Circuit.

Opinion by CHRISTIANCY, J.—The bill was dismissed below upon demurrer, and the question was whether it stated a case which entitled the complainant to equitable relief. June 1, 1869, Thodeu Newell owned some land purchased of the United States, on the Muskegon River. He had platted the lands clear of the water and leased the water privileges to the defendant company. The lease was to expire March 1, 1870, and defendants were in possession transacting their business. June 1, the aforesaid Newell sold to complainant for \$26,000, twenty-three lots fronting on the said river and extending to the center of the stream, subject to the public right of navigation. It was also subject to the lease, and complainant was entitled to the rents. Complainant in due season notified defendant that he should want possession of the leased premises as soon as the lease expired, as he required this part of the property for his own use, he having a steam saw mill in the immediate vicinity.—But complainant has been unable to get possession of the premises, as defendants persist in holding over; so he has 100,000,000 feet of logs which he wishes to raft to his mill, but is unable to do so because of the course of the defendants. Irreparable injury is charged and the complainant prays that the defendants may be de-

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creed to remove forever, and release to complainant all claim and pretence of claim to said lands; that complainant's title may be decreed free from the cloud created by such claims, that defendants may be enjoined from using the lands, etc.

Held, That supposing the averments of the title to be true, no case requiring the interposition of a court of equity was made out. The complainant has a clear and perfect remedy at law. It is the common case of a tenant holding over after the expiration of his lease, and no reason is shown why the tenant cannot avail himself of the summary action given by the statute, and oust the defendants, or why he cannot resort to an action of ejectment. If complainant had proceeded at law, he might have obtained the auxiliary writ of injunction from the Court of Chancery to restrain the defendants from injuring his property, but there is no ground for exercising original jurisdiction. The Court considered that no case was made which warranted relief upon the ground of a cloud existing upon complainant's title, nor did it consider the danger of irreparable injury by any means as strong as charged in the bill.

The decree of the Court below, dismissing the bill, was affirmed, with costs.

 WAGER vs. PECK.

If a paper supposed to constitute a part of the bill of exceptions is not incorporated in the body of the bill as signed by the Judge, it must appear by means of identification contained in the bill that it was made a part of it by the Judge who settled the bill of exceptions.

Under the act of 1889, to regulate the practice in charging juries, the requests complied with or refused do not constitute an integral part of the record to be returned on writ of error independently of any bill of exceptions. The statute does not change the form or office of a bill of exceptions or the mode of reviewing instructions.

Error to St. Joseph Circuit.

Opinion by GRAVES, J.—On inspecting the record it is clear that the assignments of error are all based upon supposed exceptions to refusals to charge as requested and to the charges given, while the return to the writ of error affords no ground for the objection.

PERRY vs. SPENCER.

The supposed bill of exceptions neither shows the requests supposed to have been made or the charge which the Court gave, or sets forth any exceptions, or states that either party prayed instructions. Nor does it suggest that any other was made a part of it. It is true that there are two papers in the return, which seem to have been made as requests on each side, and the word "refused" is written against those for the plaintiff, and the word "given" on one for the defendant. But those papers and marks have no other authorization than such as they derive from the circumstance that they are bound up in the returns to the writ. If a paper supposed to constitute a part of the bill of exceptions is not incorporated in the body of the bill as signed by the Judge, it must appear by means of identification contained in the bill that it was made a part of it by the Judge who settled the bill of exceptions. The papers in question cannot be considered as forming part of the bill of exceptions.

Held, That under the act of 1869, to regulate the practice in charging juries, the requests complied with or refused do not constitute an integral part of the record to be returned on writ of error independently of any bill of exceptions. The statute does not change the form or office of a bill of exceptions or the mode of reviewing instructions. Its purpose is to keep separate the functions of Judge and jury, to induce a reasonable measure of distinctness in charging, to perpetuate in permanent form the rulings of the Judge and to render more easy and certain the settlement of bills of exceptions.

Held, That under the circumstances of the case, it not being clear that any good would be done, the Court will not allow the record to be withdrawn, for the purpose of amendment, and the judgment is affirmed with costs.

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[This case involves the question of the application of certain payments, and the following is as brief a statement as can well be made, and hence the omission of the usual head-note.—
R.S.]

Error to Saginaw Circuit.

PERRY vs. SPENCER.

Opinion by GRAVES, J.—In this case the Court previously held that voluntary payments to the amount of the penalty of the bond would discharge it. The case now comes up from a second trial on an objection to the finding of the Court. Spencer, and George K. Newcomb were owners in common of a planing mill, and carried it on under the name of Spencer & Newcomb. Spencer sold out his interest to Perry, who gave his bond to Spencer in the sum of \$6,000, by the conditions of which he was to pay or cause to be paid the debts, liabilities and claims against the former firm of Spencer & Newcomb, and indemnify Spencer against them. Perry & Newcomb continued the business for a short time, when Perry bought out Newcomb on the same terms on which he had bought out Spencer. Perry at different times paid a large amount of the debts of Spencer and Newcomb, and a considerable portion of the amount was paid during the continuance of the firm of Perry & Newcomb, some of which was in cash, but the principal part was in notes of Perry & Newcomb. Before the notes matured, the sale from Newcomb to Perry took place, and by the arrangement between them, Perry assumed the payment of these notes and subsequently paid them. The debts of Spencer & Newcomb, paid by Perry in cash up to the time when he purchased Newcomb's interest, were charged by him to the firm of Perry & Newcomb. The right to recover was made to turn, in the court below, upon the effect to be given to the payments by Perry which were charged in the books to Perry & Newcomb. If the whole sum of these payments was reckoned against the bond, then it was admitted that the bond was satisfied. But defendant in error contended that, as the sums so paid were charged in the firm books of Perry & Newcomb, they were in effect payments by that firm, and that, as against his bond, Perry could only claim the half of such payments and the Circuit Judge so ruled.

Held, That this was error.

Perry's agreement was to take up or cause to be taken up the debts of the old firm to the amount of \$6,000, and it was not material to Spencer from what source he obtained the

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means so to do. The arrangements between Perry and Newcomb were matters for their consideration.

Judgment reversed and a new trial ordered.

MCGRAW vs. SCHWAB.

A writ of *certiorari* brings up for review questions of law only.

Error to Wayne Circuit.

Opinion by CHRISTIANCY, J.—Defendants in error brought suit in a Justice's Court against plaintiff in error for certain liquors alleged to have been sold to him at Chicago. Defendant below pleaded the general issue and gave notice that he would prove that the liquors were sold in Michigan and that the sale was void under the statute. The jury found a verdict for the defendant, and the cause was removed to the Wayne Circuit by writ of *certiorari*.

The only question complained of in the affidavit for the writ is that "the judgment is erroneous, for the reason that the testimony given on the trial demanded that a verdict for damages should have been given in favor of the plaintiffs and against the defendants."—There was no question of law raised; questions of fact were only presented upon the weight of the evidence, which had already been passed upon by the jury, and upon the writ of *certiorari* only questions of law could be tried.

The Circuit Court had therefore no jurisdiction to review the cause either upon the facts or the law, and, therefore, no power to alter the judgment, and the judgment should have been affirmed or the case dismissed with costs. But in fact the judgment was reversed and a judgment rendered for the plaintiffs for the amount which, in the opinion of the Court, they ought to have recovered, and this in direct opposition to the finding of the jury.

This was clearly erroneous. The judgment of the Circuit Court must be reversed, that of the Justice must be affirmed, and the plaintiff in error must recover his costs in both courts.

WETHERBEE vs. GREEN *et al.*

WETHERBEE vs. GREEN *et al.*

Where a person acting in good faith cuts timber from lands, supposing he has a right so to do, and by his labor and the expenditure of money manufactures it into articles of much greater value than the timber, he acquires such a property in the timber thus converted, it cannot be reclaimed by the trees. The remedy of the owner is by an action of trespass.

A mere license to enter upon land and cut timber does not confer a legal right to do so; but it nevertheless protects the licensee so far as he has acted under it before revocation, and the protection does not depend upon the form, but upon what has been done, having proceeded by consent.

Error to Bay Circuit.

Opinion by COOLEY, J.—The defendants in error replevied of Wetherbee a quantity of hoops which he made from timber cut upon their land. Wetherbee defended the replevin suit upon these grounds: First, he claimed to have cut the timber under a license from one Sumner, who was formerly tenant in common of the land with Green, and had been authorized by Green to give such license. Before the license was given, however, Sumner had sold his interest to Camp and Brooks, the co-plaintiffs with Green, and had conveyed the same by warranty deed; but Wetherbee claimed and offered to show by parole evidence that the sole purpose of this conveyance was to secure a pre-existing debt from Sumner to Camp and Brooks, and that consequently it amounted to a mortgage, leaving in Sumner under our statute the usual right of a mortgagor to occupy and control the land until foreclosure. He also claimed that the authority given to Green by Sumner had never been revoked, and that the license given would be good against Green and constitute an effectual bar against the suit in replevin, which would fail if any one of the plaintiffs was precluded from maintaining it.

But if the Court should be against him on this branch of the case, Wetherbee claimed further that replevin should not be maintained for the hoops, because he had cut the timber in good faith, relying upon a promise which he had supposed proceeded from the parties having the lawful right to give it, and had by the expenditure of his labor and money converted the trees into chattels im-

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mensely more valuable than they were as they stood in the forest, and thereby he had made such chattels his own. And he offered to show that the timber was worth \$25, while the hoops were worth some \$700. He also claimed to have known nothing of the Sumner assignment. The evidence offered to show these facts was rejected by the Court and plaintiffs obtained judgment.

The principal question involved in the case was: Has a party who has taken the property of another in good faith, and in reliance upon a supposed right, without any intention to commit wrong, has by the expenditure of his money or labor, worked upon it so great a transformation as that which this timber underwent in being transformed from trees to hoops, acquired such a property therein that it cannot be followed into his hands and reclaimed by the owner of the trees in its improved condition.

The authorities were examined at length, and the Court concluded that the Judge below had erred in rejecting the testimony offered. That the defendant had a right to show that he had manufactured the hoops in good faith and in the belief that he had the proper authority to do so; and, if he should succeed in making that showing, he was entitled to have the jury instructed that the title to the timber was changed by a substantial change of identity, and that the remedy of the plaintiff was an action to recover damages for the unintentional trespass.

On the other points the Court did not entirely agree with the plaintiff in error. It was not deemed important that the deed from Sumner was intended as a mere security. Sumner would have a right of redemption, but it does not follow that he would have been entitled to possession and to all the other rights of mortgagor in courts of law. Where the deed is absolute in form the purpose generally is to vest in the grantor a larger power of control and disposition than he would have by statute under an ordinary mortgage. Perhaps the statute, which forbids ejectment by mortgage before foreclosure, was not intended to reach a case of this description.—The Court thought that the mere circumstance of the sale of Sumner's interest did not operate in law as a reservation of the authority previously given to Sumner to sell the timber. Nor was it necessary that the license given to Sumner by Wetherbee should be in any particular form. A mere license to enter upon land and cut

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timber does not confer a legal right to do so; but it nevertheless protects the licensee so far as he has acted under it before revocation, and the protection does not depend upon the form, but upon what has been done, having proceeded by consent. However informal the consent may have been, the land owner cannot be allowed, by afterwards recalling it, to make the licensee a trespasser for what he has done in reliance upon it.

Judgment reversed and a new trial ordered.

STOCKWELL vs. THE TOWNSHIP BOARD OF WHITE LAKE.

Interest of Township Clerk in a matter upon which the Township Board are to take action, disqualifies such Clerk from sitting as a member of the Board, while such action is being taken.

Certiorari to Oakland Circuit.

Opinion by GRAVES, J.—The writ brought up the proceedings of the township Board of White Lake for the removal of the plaintiff in error from the office of moderator of school district No. 4 in that township. Some proceedings had been held there looking towards the erection of a new school house, and it was claimed by some and denied by others that a rated resolution had been passed to that effect. William B. Stockwell and a Mr. Worden were appointed a building committee, and made a contract with Charles Porter to build the house, and with Mr. Barwell to lay the foundation wall. Wm. B. Stockwell afterwards drew two orders in favor of these gentlemen upon the person having the school funds and the plaintiff in error, as moderator, was requested to countersign them. He refused to do so, alleging that the payees had no right to the money. August 8, Wm. P. Stockwell filed a complaint to the township Board against the plaintiff in error, for persistently refusing to discharge the duties of his office. Porter was Township Clerk, and notified the plaintiff in error that the Board would meet at his office, August 10, to hear and determine the complaint. They met, but had but three sitting members, of whom Porter was one. Plaintiff

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in error objected to him, but the Board proceeded and determined that he should be removed.

Held, That Mr. Porter was interested in the questions to be determined, and was therefore not a competent person to sit upon the Board. Its proceedings were quashed, and the plaintiff in error was given his costs.

 JOSSELYN vs. McALLISTER.

Error to Hillsdale Circuit.

Evidence of conduct and declarations as bearing on question of motive in an action for false imprisonment.

The Judge, while charging the jury, read from a text-book, with a statement that he would afterwards incorporate it in his written charge. *Held*, not to be a ground for the reversal of judgment.

In cases where arrests are made in civil actions, it is not necessary that the action for false imprisonment should be postponed until the termination of the other action; that rule holds good in regard to criminal arrest.

The question of malice discussed—malice defined.

Opinion by CAMPBELL, C. J.—The action below was for false imprisonment and malicious prosecution, the injuries complained of being two successive arrests on what was claimed to be an insufficient showing in law. The case went to the jury on the counts for false imprisonment, and judgment was rendered for the plaintiff below, and was removed to the Supreme Court. The plaintiff below was allowed to show the temper and demeanor of Josselyn when arrested in the present action, and gave proof of angry conduct and expressions on that occasion and subsequently. This evidence was introduced to show motive in Josselyn at the time he made the affidavits for McAllister's arrest some months before. *Held*, That such evidence was not proper for such purpose. His declarations and admissions concerning the former transaction would be evidence against him and seem to have been received without objection. But the mere fact that he was vindictive and sullen when arrested has no bearing on his state of mind when he was causing some one else to be arrested.

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There was evidence that some negotiations had been had through the medium of Mr. Cheever, one of the attorneys of Josselyn, in regard to a settlement of the matters out of which the arrests complained of originated. The Court below refused to admit proof of what Cheever told Josselyn concerning that arrangement. *Held*, That if such evidence showed facts of such a nature as to indicate that the party believing them may have acted upon them without improper motives and in good faith, it might bear somewhat upon the question of malice, and should have gone to throw light on the spirit of the prosecutions. There was, however, no error in rejecting Cheever's account of the facts themselves, as the question of malice does not depend upon those facts.

Held, That testimony as to Josselyn's information from his attorney as to the cause of McAllister's discharge was receivable as bearing upon the spirit of the other arrest. The Court could not see any legitimate bearing which the instructions received by Josselyn from the company that employed him could have on any of the issues in this case. Nor could it justify this arrest that Josselyn had been in the habit of procuring the arrest of others under similar circumstances.

A question was raised below whether the charge was not entirely vitiated by the Judge's reading from a text book with a statement that he would afterwards insert it in his written charge. No specific objection was taken to this course, and the Court held it not ground on which a judgment would be reversed.

The Court having charged the jury that an action for malicious prosecution would not lie until that suit was terminated, directed the jury not to consider any of the counts except for false imprisonment, but refused to charge that no action would lie for false imprisonment before the termination of the suit on which the arrest was had. *Held*, That in cases where arrests are made in civil actions, it is not necessary that the action for false imprisonment should be postponed until the termination of the other action; that rule holds good in regard to criminal arrest.

As the requests to charge were made in writing and not

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read to the jury unless granted, it is manifest that they cannot in any case have been misled by any refusal into mistaking the ground of the refusal. If the plaintiff in error has not been deprived by such refusal of any instruction he was entitled to, he has not been damnified. If his requests were wrong or given as clearly in the language of the Court as in his own, he has not been damnified. The Court charged that there could be no recovery if the defendant below when he made his affidavits had reasonable or probable cause to believe their statements were made in good faith, and that there could be no recovery unless he was actuated by feelings of malice and explained probable cause as a reasonable ground of suspicion, supported by circumstances sufficiently strong to warrant a cautious man in the belief that the party arrested is guilty of the offences with which he is charged. And malice was defined as an act done wrongfully and without reasonable excuse, but the court charged that if defendant before proceeding, laid all the facts before his counsel and acted in good faith on the opinion of counsel, he was not liable. But if he misrepresented the case or did not act in good faith, or did not believe there was good cause to make the affidavit, he was liable; and it was for the jury to determine whether he acted in good faith and honestly believed the statements in his affidavits to be true.

Held, That plaintiff in error had no cause to complain of any of these charges. The Court was also right in holding that not mere nominal damages could be recovered, where there was an allegation and proof of special damage. The jury may give general damages in such a case, to be determined by the circumstances.

Judgment reversed with costs, and a new trial ordered.

PARSONS vs. DICKINSON.

Objections taken to testimony before an officer taking a deposition, must be renewed in the court in which such deposition is used, if the party would avail himself of the benefit of his objections.

An indorser of a note though not legally notified of the dishonor of the same, will be deemed to have waived the want of notice, where it appears that he subsequently stated that he expected and intended to pay the note.

Error to Wayne Circuit.

PARSONS vs. DICKINSON.

Opinion by COOLEY, J.—This cause was commenced in a Justice's Court. The cause of action was an endorsement by Dickinson of a note made by one Kibbee, payable at the First National Bank of Detroit. The defence was that defendant was never legally notified of the dishonor of the note. The Justice gave judgment for the plaintiff, which was reversed by the Circuit Court, and the latter judgment comes up for review.

Two alleged errors were considered: First, that the Justice erred in receiving evidence of the custom of the bank as to making inquiries for the residence of the indorsers when they were unknown to the officers to whom the paper was committed for protest. Second, that the Justice erred in rendering judgment in favor of the plaintiff when there was no evidence in the case tending to show that proper steps had been taken to fix the liability of the defendant as endorser.

When the note fell due the defendant was a resident of Macomb county, and the only notice received by him was one deposited in the post-office directed to him at Detroit. On the trial the officer who protested the note was allowed to testify through his deposition, as to inquiries which he made concerning the defendant's residence, and also as to the diligence generally employed by the bank in these matters. It does not appear, however, that objection was made to this testimony. Defendant seems to have supposed that it was sufficient for him to make his objections before the officer taking the deposition; but this was an error. Objections taken before him are only for the purpose of reserving them for decision by the tribunal which is competent to pass upon them. No other rule would be fair either to the party offering the evidence or to the Justice.

The Court did not enter into the discussion of the question of diligence, as they deemed another point decisive of the case. Defendant was not bound to insist upon his defence on the ground of the want of notice, but might waive it if he so chose. It was proved on the trial that defendant, after the dishonor of the note, had an interview with the officers of the bank, and though he remarked that he had not received notice of its dishonor, he said he expected to pay it and wished the plaintiff to

MACUMBER vs. BEAM.

get it from Kibbee. The defendant was sworn in his own behalf and did not deny this statement. With full knowledge of the facts the defendant recognized his liability.

The judgment of the Circuit Court is reversed and that of the Justice affirmed, the plaintiff to recover costs in both courts.

MACUMBER vs. BEAM.

In an application for a dissolution of an attachment, under the act of 1851, the application is sufficient so far as showing title to the property in the applicant, if from its terms it would reasonably be inferred that the property still continued to belong to the applicant.

In an application to dissolve an attachment, under the act of 1851, the burden of proof is upon the plaintiff to show the existence of facts justifying the issuing of the writ.

Certiorari to Commissioner of Kalamazoo Circuit.

Opinion by CHRISTIANCY, J.—This was an application made by Beam, the defendant in error, under the act of 1851, to a Circuit Court Commissioner of Kalamazoo County, for the dissolution of an attachment issued from the Circuit Court of that county against Beam at the suit of Macumber. The first objection was that the application presented to the Commissioner does not show by sufficient and certain allegations the right of the petitioner to the property attached. The allegation is certainly necessary that the property of the applicant has been attached, but it has not been held that the application must contain an express averment that the property still belongs to the applicant. The farthest the Court has gone has been to hold that whenever it affirmatively appears that the property at the time of the application did not belong to the applicant, he was not entitled to have the attachment dissolved in this proceeding.

The case of *Osborne vs. Robbins*, 10 Mich, 277, contains a dictum from which the other allegation might be deemed necessary, but the facts did not call for any such decision. And the Court thought the application sufficient, if from its terms it would reasonably be inferred that the property still continued to belong to the ap-

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plicant. In this case the attachment is clearly stated. The prayer is that the attachment may be dissolved and the property restored to the applicant. This implies a continued ownership.

The other question raised by the case was whether, upon the hearing before the Commissioner, the plaintiff in the attachment is to begin by showing good cause for its issuing, or whether the defendant is to begin by showing the non-existence of such cause, and upon whom rests the burden of proof. *Held*, That the plaintiff is to begin, and that the burden of proof is upon him to show the existence of such facts as justified the issuing of the writ.

There was no error in the proceedings, and the judgment was affirmed with costs.

MILLER vs. SWEITZER.

A and B assaulted and beat C. A was arrested and tried—B not arrested. On the trial the prosecution offered evidence as to a certain wound inflicted upon C by B. Objection was made that as A was prosecuted alone and as it did not appear that there was any concert of action between A and B in making the assault, the evidence was inadmissible—*Held*, That the proposed evidence should go to the jury.

Error to Wayne Circuit.

Opinion by GRAVES, J.—This was an action on the case by Sweitzer against Miller to recover damages alleged to have been occasioned by an assault and battery. Loss of business and the expenditure of money for medical purposes were charged. Plaintiff offered evidence tending to show that he called at the grocery of Miller on business, when an altercation occurred between himself and Miller's wife respecting payment for some beer which she claimed he had purchased on a previous occasion. Sweitzer on the stand testified that on his refusal to pay Mrs. Miller she took his hat and threatened to take his watch. That he sought to regain his hat, whereupon Mrs. Miller threw him down, held him, and called to her husband to come and kill him if he did not give up his watch or pay for the beer. The defendant then seized him about the neck and struck him several blows, while Mrs. Miller struck him several

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times in the head with a hatchet. The last evidence was objected to as having nothing to do with Sweitzer. Dr. Granger was asked if he could tell how the wounds on the head were caused, but an objection was taken on the ground that there was no evidence going to show that Sweitzer struck the blows on the head. The objection was overruled, and the witness stated that the wound must have been made with a blunt instrument something harder than the fist. The questions in the case arose on the refusals of the Court to sustain the objections to the admission of testimony.

Plaintiff in error took the ground that as he was prosecuted alone, and it did not appear that there was any concert of action between himself and his wife, or that his acts naturally and ordinarily produced the blows given by his wife, the evidence respecting her assaults were inadmissible. The Court, however, held that the husband and wife were clearly, according to the testimony, engaged in the assault together, and that the whole evidence should go the jury, who were the judges of the facts.

The judgment of the Circuit Court is affirmed with costs.

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A policy of insurance had endorsed upon it as one of the clauses of forfeiture, the words, "If without written consent hereon, there is any prior or subsequent insurance, this policy shall be void." Subsequently, and without giving notice to the company, an insurance was effected in another company. A few weeks after the second insurance an agent of the company first insuring, residing at another place, endorsed on the policy, the words:—"Other insurance to the amount of \$4,000 is hereby permitted, December 7, 1867." In a suit on the policy, *Held*, That upon sound rules of construction the consent should have been signed by the general agent at Chicago, with it whose signature the policy was not to be valid. The unsigned consent cannot be sustained in the absence of the general agent's signature, without distinct proof that it was made by some one who was in fact, or by their conduct might be fairly supposed to be authorized to bind the company in that way, or was recognized and acted upon afterwards so as to bind them by some sort of estoppel. The policy became void if there was subsequent insurance without consent. And the actual consent given was not a consent to a past insurance, but rather to one in the future.

Error to St. Joseph Circuit.

Opinion by CAMPBELL, C. J.—Judgment was rendered against plaintiff in error on a policy of insurance. The defence rested

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on a forfeiture of the policy by failure to have certain additional insurance consented to, by endorsement on the policy and on a failure to furnish the proofs required by the terms of the policy.

Inasmuch as measures were taken immediately after the fire, by the holder of the policy and the agent to ascertain the facts and extent of the loss, and no formal proof of loss seems to have been required by the agent, the matter was properly left to the jury to find whether the former proofs had not been waived.

The insurance was for \$3,000. The policy contained, among other clauses of forfeiture, one which declared that, "if without written consent hereon, there is any prior or subsequent insurance, this policy shall be void." The policy was dated September 17, 1866, and renewed September 17, 1867. Up to the latter date there had been no additional insurance. The policy did not say who should sign the contract.

October 22, 1867, Fay obtained a policy for \$2,000 from the agent of a Detroit company. No consent was obtained in advance, nor was any notice given of it until December 7, 1867, when A. G. Martin, an agent of the company, residing in another place, wrote upon the policy the words, "Other insurance to the amount of \$4,000 is hereby permitted, December 7, 1867." The memorandum was not signed by any one; but Martin swore that he omitted the signature by mistake. The evidence as to whether Betts, the regular agent, was informed of this before the fire or not is conflicting.

Held, That upon sound rules of construction the consent should have been signed by the general agent at Chicago, without whose signature the policy was not to be valid. The unsigned consent cannot be sustained in the absence of the general agent's signature, without distinct proof that it was made by some one who was in fact, or by their conduct might be fairly supposed to be authorized to bind the company in that way, or was recognized and acted upon afterwards so as to bind them by some sort of estoppel.

The condition in the policy contemplates, too, that the consent to future insurance should be given in advance. The policy became void if there was subsequent insurance without consent. And the actual consent given was not a consent to a past insurance, but rather to one in the future. It was further held that there was no evidence of the waiving of the written consent by the agent, Betts. Also that the company had the right to the instruction asked, that if there was any attempt to defraud the company by not complying with the conditions of the policy, the plaintiff could not recover.

Judgment below reversed, and a new trial ordered.

Abstracts of Decisions of the Supreme Court rendered at the
July Term, 1871.

BURCHARD vs. FRAZER.

R. as the agent of his wife, contracted to sell a tract of land, representing the same to contain 514 68-100 acres, to F, knowing there was not so many acres in the tract, for a certain sum per acre. The deed did not contain a warranty of quantity. F gave a mortgage to secure a part of the purchase money. B subsequently became the assignee of the mortgagee.— In an action to foreclose the mortgage, *Held*, That B be treated as vendor and mortgagee, and that the mortgagor may have deducted from the mortgage a proportionate amount on account of the deficiency in the land.

Whether a note given for accrued interest on an obligation secured by mortgage is to operate as payment so as to detach the amount of such note from the lien of the mortgage, discussed, and, in this case, *Held*, That the lien as to the amount of such note was discharged.

Where a mortgage debt matures, and the mortgagor in consideration of the forbearance of the mortgagee to foreclose, agrees to pay a higher rate of interest than was first stipulated, *Held*, That the mortgage is as between mortgagor and mortgagee a lien to secure payment of such additional rate of interest.

Error to Wayne Circuit.

Opinion by Christiancy, J.—The first question in this case is whether Frazer, the mortgagor, and the other defendants who are purchasers from him are entitled to the deduction of \$680 for the deficiency of twenty acres of land at \$30 per acre.

Held, That the complainant acting as the agent of his wife who owned the land, in making the sale to Frazer, and in taking the mortgage for the balance of the purchase price, and having since become the assignee of the mortgage, may, as far as related to this question, be treated directly as vendor and mortgagee. The sale was a sale by the acre very clearly. The proposition to sell was as follows, viz :

“ 514 68-100. I propose to sell James H. Frazer, my land in the town of Dearbon, 514 68-100 acres, together with the house thereon, for the sum of \$30 for each acre of land, and \$50 for the

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house thereon, \$4,000 to be paid on the delivery of the deed, the balance to be secured by mortgage on the same land, sold with a stipulation that the timber shall not be cut off only in just proportion to the payments made in one, two and three years, with interest annually, one-third of the balance each year, and pay for one-half the expense of writings."

The deed as drawn up did not contain a warranty of quantity, but it appears that the price paid was exactly in accordance with the proposition, \$30 per acre for 514 68-100 acres, and \$50 for the house, and that complainant knew when the deed was given and mortgage taken that the tract contained only 494 68-100 acres, leaving a deficiency of 20 acres, and that he had in his possession the minutes of the survey which showed this deficiency, and that he also knew that from his representations to Frazer the latter supposed he was getting the whole quantity—514 68-100 acres. The deed was surreptitiously altered by adding "more or less" after the description of the land before execution.

Held, That complainant in thus misrepresenting the quantity, and in making the sale to Frazer for a price corresponding to the larger quantity, was guilty of a deliberate fraud. Frazer, on discovering the deed might have sustained a bill for reforming the deed or for a deduction from the purchase price. He is equally entitled to the deduction in this suit for the foreclosure of the mortgage.

The next question is whether Frazer's note of December 15, 1866, given to Jas. F. Joy, who then held the bond and mortgage as trustee for Mrs. Burchard, for \$1,497 62, the amount of interest then due and in arrear, operated as payment so far as the mortgage was concerned.

Held, That the mere giving of a note for accrued interest, without anything more to show the intent of the parties, might not have this effect; but the bond and mortgage were drawing interest only at seven per cent, and the interest itself though due, was not drawing interest, as the claim then stood. The note was drawn with interest at ten per cent. Two important advantages, therefore, were secured to the creditor by taking the note—advantages which might well be supposed to outweigh the value of the mortgage lien for the same sum without interest, and the note created a new obligation on the part of the debtor, quite different from that secured by the bond

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and mortgage. The course of action of the creditor shows the intention to detach this amount from the lien of the mortgage, and to treat the note as payment. In December, 1868, he took a new note of Frazer for the interest accrued upon this note, and receipted that amount upon the larger note, and a judgment has since been recovered on the smaller note, though the amount is still unpaid. May 5th, 1869, Frazer entered into a written agreement to pay ten per cent on all the balance due on the bond and mortgage from December 15th, 1867, when the whole became due. The agreement states, "the amount to be ascertained to-morrow," and the accounts of all the payments and calculation of interest in pursuance of the agreement showing the amount due May 5th, 1869, as furnished in writing to Frazer, credits this note as payment, thus: "Payment, December 15th, 1866. Frazer's note. \$1,497 62," and the balance is made out on this basis, precisely as if the amount had been paid in cash. There is no reason to doubt that this note was intended to operate as payment, or to detach and relieve that amount from the lien of the mortgage.

The only remaining question is upon the validity and effect of the special agreement made by Frazer with Joy, on May 5th, 1869, to pay ten per cent interest from December 15th, 1867, when the whole sum not paid had become due upon the bond and mortgage. This agreement shows that there had been forbearance before its date, which was sufficient consideration for the agreement to pay the additional interest up to that date, and any forbearance which took place thereafter on the faith of that agreement was sufficient consideration for the promise to pay ten per cent interest till paid. This agreement was in terms attached to the debt secured by the mortgage.

Held, That as between the mortgagor and mortgagee, or holders of the papers, the agreement was valid, and should have the same effect as between them as if the original bond and mortgage had provided for ten per cent interest after December 15th, 1867, till paid.

But when this agreement was made, and before maturity of the mortgage debt, Frazer had sold all the land covered by the mortgage, in separate parcels to various parties, some of whom are defendants in this case.

Held, That, as to these purchasers it was no more competent for

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Frazer to increase the mortgage debt or amount of the incumbrance by any such agreement than it would have been to affect them by an additional mortgage subsequently executed for the increased sum.— He could only bind himself personally that the interest on the mortgage debt should be thus computed, and the complainant as against him personally is entitled to a decree at the increased rate of interest. But as far as relates to the lien of the mortgage upon the land, all of which has been sold to other parties, complainant is only entitled to a decree for the amount at seven per cent interest, as if the agreement had never been made.

The decree as to defendant Frazer should be modified so as to allow the recovery against him of any balance of the mortgage debt, calculating the amount at ten per cent interest, according to the terms of the agreement and in other respects affirmed, and the record sent back to the court below for the execution of the decree—complainant to recover costs in this Court as against Frazer, but the other defendants recover their costs of appeal against complainant.

SMITH et. al. vs. WEBSTER et. al.

Liability of principal for trespass of agent or servant. Relation of master and servant.

Error to Jackson Circuit.

Opinion by CAMPBELL, C. J.—Plaintiffs sued defendants for trespass for the destruction of trees upon their lands. The alleged trespass was not committed by the defendants themselves, but by others in their employ who were engaged in cutting trees and gathering bark for defendants on their own lands, and went on plaintiff's lands, as they claim by mistake.

The Circuit Court held that there was no liability in this action, unless the trespass was committed by the actual direction of defendants, or was ratified by their assent, or appropriation of the property, with knowledge of the trespass. And the Court refused to charge that any wrongful act or negligence of the defendants whatever could subject them to this action.

It was claimed on the argument that the persons doing the

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wrong were not in law the servants of the defendants, but were in the position of independent contractors, for whose acts none but themselves and their immediate employees could be held liable.

Held, That the evidence warranted no such conclusion. The men were employed as laborers of defendants, subject entirely to their control. The intermediate agent was an overseer, and the acts complained of were done in the regular course of business, not wilfully. All these were servants of the defendants, and the latter are responsible for their acts. If the offence of the men would be trespass, there is no sense in holding the master exempt from the same kind of responsibility, and however the common law may have been, the policy of our statutes would hold absent employers liable.

The action was properly brought, and the evidence tended to prove no other relation than that of master and servant.

Judgment reversed with costs, and a new trial ordered.

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It is to be presumed from the judgment, except in the case of inferior tribunals or those not proceeding according to the course of the common law, that jurisdiction of the parties was duly obtained.

The appearance of an attorney for a defendant is to be taken as *prima facie* evidence that he had authority to appear.

The want of a seal to an execution does not render it void, and such execution may be amended.

In the computation of the time required by statute in the service of notice of an application for an order for a commission to take testimony, the day of service is to be excluded, and that on which the application is to be made included.

Notice of the settlement of interrogatories may be served at the same time with the notice of the application for a commission.

Discretion of the Judge as to cross-examination.

A Deputy Sheriff, after the expiration of his term of office, was permitted without any affidavit or other showing, to endorse on a declaration served by him while in office, an amendment to his return so as to show that a copy of a rule to plead was endorsed on the copy served by him. *Held*, That this was error.

Error to Washtenaw Circuit.

Opinion by COOLEY, J.—*Held*, That the objection taken to the admission in evidence of the judgment in the Federal Court against

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James Arnold in favor of Clark has no force. The ground of the objection was that it did not appear on the face of the record that Arnold was served with process. It is to be presumed except in the case of inferior tribunals or those not proceeding according to the course of the common law, that jurisdiction of the parties was duly obtained. In this case, however, an attorney of the Court assumed to answer for the defendant and consented in writing to the rendering of the judgment. It must be assumed, in the absence of evidence to the contrary, that he was duly authorized to act.

Held, That the objection to the certified transcript, that it did not show the execution issued on the judgment to have been under seal, is not a valid one. The want of a seal, if really wanting, might have been supplied on motion to amend, and did not render the execution void.

Held, That the Court erred in rejecting the deposition of Page. The ground of rejection was that ten full days' notice of the application for the order for the commission was not given as required by the statute. The notice was of an application to be made on March 15, 1860, and was served on March 5. The general rule is to exclude the day of service and include that on which the application is to be made, and under this rule the service was in time. The notice required in this case comes within the general rule, and is not within the exceptions to said rule.

The defendants in error also object to the deposition that notice of the settlement of interrogatories was given at the same time with the notice of the application for a commission, and of course before the order for issuing the commission had been granted.

Held. That the statute does not in terms provide that the commission must be ordered before any steps can be taken to settle interrogatories, and there is no reason for putting such a construction upon it, as the same opinion is to decide upon the application and settle the interrogatories. It seems not improper to give such notices that the settling of the interrogatories may immediately follow the order for the issuing of the commission.

One Stowell was sworn for the defendants, and a member of the bar was called to impeach him, and testified that he had known Stowell for a number of years and knew his reputation for truth and veracity in the neighborhood where he resided, and that it was bad.—

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On cross-examination he testified: "I have had no personal difficulty with Stowell; he was a witness in the Goldsmith divorce case; I was counsel in that case." He was then asked: "Did the judgment of the Court sustain the theory of the case to which Mr. Stowell testified?" The question was objected to but allowed, and the witness replied: "The judgment of the Court was in accordance with the theory testified to by Stowell in that case."

Held, That very much ought to be left to the discretion of the Circuit Judge as to the extent to which cross-examination shall be allowed, and that this decision ought not to be set aside because of the latitude of examination permitted, unless there had been a clear case of legal indiscretion. See *Stewart vs. The People*, decided last term. There is no reason for holding that the discretion of the Circuit Judge was exercised improperly or unwisely.

Error was also assigned in reference to the action of the Court in suffering an amendment to be made in support of one of the judgments under which the defendants justified. The judgment was one taken by default on a service of declaration made by the defendant Osborn, who, when service was made was a deputy sheriff, but who ceased to be such when the trial was had. The certificate of service did not show that any copy of rule to plead was served with the declaration, and the Court, when objection was taken to the judgment on this ground, allowed Osborn, without any affidavit or other showing, to amend his return in such a manner as to show that a copy of rule to plead was indorsed on the copy of declaration served by him.

Held. That great liberality should always be shown in permitting amendments in furtherance of justice; but when a record is to be corrected under circumstances like these, all due precautions should be observed to have proper evidence, so that the amendment when made will represent actual fact. Evidence of service of a declaration may be made either by affidavit, or by the official return of the Sheriff, and in either case a protection against, or a remedy for, a false proof of service.— Here there was no official return of the service upon which there was legal liability. The former Sheriff cannot be liable

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for the trust which he had confided to Osborn had terminated. and he no longer authorizes Osborn to use his official title for any purpose, nor would he have any remedy against any sureties he may have required of Osborn. Neither would the amendment be made under the sanctity of an official oath, for the person making it was no longer an officer when it was made. A showing should have been required by affidavit instead of an amendment of the official return.

The judgment of the Court below is reversed with costs and a new trial ordered.

CLARK vs. WEST.

Evidence showing that the plaintiff in an action of replevin had no right to the possession of the property when he commenced his suit is a bar to his action; and such evidence is admissible without a plea in abatement or plea *pus darven continuance*.

Error to Oakland Circuit.

Opinion by GRAVES, J.—In April, 1870, Clark sued West in replevin for a heifer, before John H. Dresser, a Justice of the Peace. May 21, judgment was rendered for West, and Clark removed the case to the Circuit on *certiorari*. The heifer was returned to West after the judgment, and five days after that, notice of the *certiorari* was served on the Justice, and West was required to return the animal to Clark. She was taken from the stable of West by Brown, the co-defendant, and was returned to Clark by him. On that same day West, who claimed that this taking was not with his consent, brought replevin against Clark before George Robertson, another Justice, and June 15, Robertson gave judgment for West, and Clark appealed. Meanwhile the Court had considered the first case and reversed the judgment of the Justice. The second appeal having come on for trial, West proved the proceedings before the other Justice, the judgment, the subsequent taking of the heifer by Brown, her delivery to Clark and her value. He then rested the case on his behalf.

Clark then offered to prove his original title to the animal, that she was taken from him during his absence, and that the judgment

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of Justice Dresser had been reversed. The Court below held this evidence inadmissible, concluding that the judgment of Dresser was conclusive as to the title, and that the reversal could not be shown without a *plea puisdarrien continuance*, since the judgment of *certiorari* was rendered since the last continuance of the case on trial.

Held, That the rejection of this evidence was erroneous. The case of *Bablen vs. Lang*, 8 Mich., 500, was considered decisive of the matter. If the evidence tended to show that at the time of the commencement of the action the property was not in West, then the evidence should have been admitted. The cases were fully examined and found to sustain the doctrine asserted.

The judgment of the Circuit Court was reversed with costs, and a new trial was ordered.

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J, as the agent of M's creditors, prosecuted M under the non-imprisonment act. M thereupon sued J for false imprisonment, claiming that the matters laid before the Justice did not make out a *prima facie* case to authorize a warrant. The statute requires "satisfactory evidence" to be adduced to the Justice as a ground-work for the proceeding.—*Held*, That if there is any evidence legally tending to establish the statutory requirements, a court of review will not inquire whether it would deem the evidence "satisfactory;" and that if the process was irregular or wrongly or improvidently issued, if it was sued out through bad or indefensible motives, and yet was not absolutely void, the imprisonment was not false in any sense adequate to support the charge preferred. If it was wholly void and yet was obtained or allowed in perfect good faith and without any wrong motive not only J but the magistrate was liable.

Proceedings under the non-imprisonment act available to others than judgment creditors.

Held, That while a valid levy subsists on sufficient personal property, it is irregular to commence proceedings under this statute, and that a party proceeded against in both ways simultaneously may allege the same for error. But the jurisdiction ought not to be assailed in an indirect manner on this ground, through the medium of an action for false imprisonment.

The non-imprisonment act is constitutional.

Error to Bay Circuit.

Opinion by GRAVES, J.—Maxon prosecuted Johnson for an alleged false imprisonment, and the latter sought to defend by showing that the imputed trespass consisted of an arrest and imprisonment

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by means of a proceeding under the non-imprisonment act. The Court below excluded the defense on the ground that the proceedings in question were absolutely void.

The action is trespass and the party sought to be charged was a person alleged to have prosecuted those proceedings as an agent of the creditor. The ground for the action was that the plaintiff was imprisoned under color of process claimed by him to be void, and which defendant insists was not void, and the fundamental question litigated was whether the Justice acted with or without jurisdiction. If the process was irregular or wrongly or improvidently issued, if it was sued out through bad or indefensible motives, and yet was not absolutely void, the imprisonment was not false in any sense adequate to support the charge preferred. If it was wholly void and yet was obtained or allowed in perfect good faith and without any wrong motive, not only Johnson, but the magistrate was liable — The leading objection taken to the proceeding was that the matters laid before the Justice as evidence to authorize a warrant, not only did not make out a *prima facie* case, but had no legal tendency to prove what the statute required.

By the statute, the Justice is not to issue the warrant unless "satisfactory evidence" is adduced to the Justice of certain prescribed particulars which are intended as the ground-work of the proceeding, and it is provided that, "upon such proof being made to the satisfaction of the officer to whom the application shall be made, he shall issue a warrant."

Held, That this Court will not examine into the evidence presented to the officer to determine whether it is "satisfactory" to this Court, but if they find there was any evidence of the required facts submitted to him, then if he issued the warrant, it will be presumed that it was satisfactory to such officer, and if so he had jurisdiction to issue the warrant. The law does not make the jurisdiction depend on the weight of the evidence in the abstract, or on the conflicting opinions of different courts or magistrates respecting the cogency or conclusiveness of the evidence. The officer is not required to exercise his judgment upon the sufficiency of the evidence at the peril of being made liable as a trespasser if he happens to be mistaken. His decision may involve an error to be corrected and still be unassailable for defect of jurisdiction. If, therefore, the evi-

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dence laid before the Justice had a legal tendency to make out a case in all its parts, then however weak and inconclusive the evidence was, this Court is not at liberty to review it, and convert the actions of Johnson into trespass solely upon a conclusion that the Justice ought not to have been satisfied with the showing.

It is suggested that the creditor, to be entitled to proceed under the act, must be a judgment creditor, and that this must be shown.

Held, That this is erroneous, and that the proceeding was intended to be available only where there should be no judgment creditors at all.

The Court then proceeds to examine and comment upon the proofs laid down before the Justice, and concludes that the intrinsic character of the evidence was such as to present a question for the judgment of the Justice upon the weight and conclusiveness of the evidence, and as a consequence to invest the magistrate with jurisdiction. "But," it is added, "while this is so we cannot avoid adding that the case made before the Justice was, in our opinion, altogether too weak to serve as a ground for a warrant."

It was objected to the proceedings that when those proceedings were commenced the attachment in the suit commenced by the creditor had been levied upon what is claimed to have been sufficient of Maxon's goods and chattels to satisfy the debt. It is insisted that this fact of its own force rendered the proceedings void, and may consequently be shown in this action to deprive them of all efficacy as a shield or defense for Johnson.

Held, That while a valid levy subsists on sufficient personal property, it is irregular to commence proceedings under this statute, and that a party proceeded against in both ways simultaneously may allege the same for error. But the jurisdiction ought not to be assailed in an indirect manner on this ground, through the medium of an action for false imprisonment like the present.

Finally, it is objected that the act is unconstitutional. In support of this it is said that the remedy contemplated is a criminal prosecution within the meaning of section 28, article 6, of the Constitution, and being required to be carried on before a judicial officer, without a jury, the statute is void.

Held, That this proposition is wholly untenable. The present point was not involved in *Bromley vs. The People*, 7 Mich., 472.—

 HOWERTER vs. KELLY.—ZELLER vs. HARRIS.

The opinion in that case in no manner countenanced the idea that the proceeding was criminal in any such sense as to make the intervention of a jury necessary. The non-imprisonment act is not impugned by the Constitution as claimed, and the proceedings before the Justice were not void for want of jurisdiction, and they were legally admissible upon the trial as a ground of defense by Johnson.

The judgment of the Court below must be reversed, with costs and a new trial ordered.

 HOWERTER vs. KELLY.

Case made from Berrien Circuit.

The action was replevin. The writ was issued while a vacancy existed in the office of Circuit Judge, and was tested in the name of Charles Upson, Circuit Judge. The Court set aside the writ, because at the time it was issued, although Judge Upson had been designated by the Governor to perform the duties of Circuit Judge, the Clerk had not been notified of his acceptance. The Circuit Judge then proceeded to assess defendant's damages, and announced that he should give judgment for a specified amount. The plaintiff then requested the Court to find the facts in writing, but he declined to do so.

Held, 1. That the writ was properly tested.

2. That plaintiff had a right to have a finding of facts in writing.

The judgment below is reversed.

 ZELLER vs. HARRIS.

Case made from Cass Circuit.

It appears that the cause was brought into the Circuit Court by cer-

SWIFT et. al. vs. APPLESTONE.

tiorari and the judgment of the Justice was there affirmed. The plaintiff in error then caused a case to be made and brought to this Court, but the return of the Justice was not embodied in the case, but instead thereof the Circuit Judge undertook to set forth its substance.

Held, That the judgment of the Justice could not be reviewed without having his return in full before the Court, and a case made which did not embody it was fatally defective. Case dismissed.

Whether a *certiorari* case can be brought up at all by case made was not decided.

SWIFT et. al. vs. APPLESTONE.

There is no error in allowing the next friend of an infant plaintiff to act as an interpreter for a witness in the case.

In an action for damages for injuries occasioned by the bite of a dog, the defendant's knowledge of the vicious character of his dog may be considered in estimating damages.

Error to Oakland Circuit.

Opinion by COOLEY, J.—The Court held that it could not be said that the permitting the next friend of an infant plaintiff to be sworn as an interpreter for a witness who did not speak the English language, was error, whatever objections of policy might seem to apply to such a course. The common law rules excluding parties and interested persons from testifying in civil cases are entirely done away within this State.

Nor did the Court err in refusing to strike out the testimony of the witnesses Baumer and Bell. They seem to have been examined to show that the defendant below had knowledge as to the vicious character of the dog which inflicted the injury. This knowledge is properly taken into account by the jury in estimating the damages.

Plaintiffs in error argued that the Court below erred in not awarding judgment for them upon the whole record, inasmuch as the verdict was for them (defendants below, on the first and third counts and was inconsistent with any verdict against them on the second count, which was for the same cause of action as the others.

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Also that the Court erred in not giving judgment in their favor for costs upon the issues found in their favor. It was deemed sufficient as an answer to these arguments to say that the record did not show that any motion in arrest of judgment was made on this ground.— The Court further held that the three counts in the declaration were not, as a legal proposition, for the same cause of action.

The course taken to double the damages was correct, and the judgment was affirmed with costs.

LABAR vs. NICHOLS.

To entitle a person to appeal from the allowance of an administrator's account, he must show that he has been aggrieved by such allowance.

Error to Kalamazoo Circuit.

Opinion by CAMPBELL, C. J.—The Circuit Court dismissed an appeal from the allowance of an administration account, on the ground that the appellant was not a personage aggrieved by the order appealed from. The appellant was the son of decedent, who died testate, and had bequeathed him \$10 out of a considerable estate, all of which was willed to specific and residuary legatees and devisees. The will was probated and established in 1859. The account in question was settled in 1689, and the order of settlement directed this legacy to appellant to be paid, and a large surplus was shown and ordered to be distributed.

The appellant had no interest in the case save as to his legacy of \$10 and as to the question whether he might be held liable so far as his legacy went for some contingent and unaccrued claims which might be discovered. The statute requires that the person appealing must be "aggrieved," and his interest must be present and existing. No claim has yet occurred after the lapse of many years, nor does there seem any likelihood that appellant's interest will be interfered with in any way.

The order of the Circuit Court dismissing the appeal is affirmed.

THE PEOPLE vs. SCHWEITZER.—MOORE *et. al.* vs. CHEESEMAN *et. al.*

THE PEOPLE vs. SCHWEITZER.

Evidence as to the commission of other offences than the one with which respondent is accused, held inadmissible.

The weight of legitimate evidence is to be left entirely to the jury.

Error to the Recorder's Court of the City of Detroit.

Opinion by CHRISTIANCY, J.—There was no legal ground upon which the witness, Dumphy, could have been allowed to testify to the commission by the defendant of another larceny from that for which he was on trial. The general rule is unquestionable. The admission of such evidence, upon whatever ground it might have been let in, would tend directly to prejudice the defendant. He could not anticipate such evidence, and would probably be unprepared to meet it, though he might have a perfect defence to the charge.—The intimacy between Schweitzer and Stewart might probably have been shown in another way; if it could not, it does not make this sort of evidence admissible. The evidence was, therefore, improperly admitted.

There was no error in the refusal of the Court to charge that it is not safe to convict a defendant on the uncorroborated testimony of an accomplice, or any number of accomplices. This was exclusively a question for the jury.

Judgment reversed and a new trial ordered.

MOORE *et. al.* vs. CHEESEMAN *et. al.*

Appeal in Chancery from Van Buren Circuit.

The bill in this case was demurred to because it was not sworn to. This, apparently, upon the ground that from some averments in the bill it was to be subjected to the rule requiring creditors' bills to be sworn to. The Court below sustained the demurrer.

We think this was wrong. The bill does not belong to the class

DIBBLE vs. THE PEOPLE.

of statutory creditors' bills which are named in the statute to be verified. There is no rule requiring bills in cases of general equity cognizance to be sworn to. Bills that attempt to remove into a court of equity matters cognizable in a court of law, and bills in cases requiring the preliminary act of the Court upon facts stated in the bill if the facts are not otherwise established, should be verified. But the absence of a verification to a bill not requiring it is not the ground of a demurrer.

DIBBLE vs. THE PEOPLE.

Error to Hillsdale Circuit.

Opinion by CHRISTIANCY, J.—The question in the case was whether upon proceedings in the nature of forcible entry and detainer when had before a Justice of the Peace the costs are limited to \$10, as provided by section 127, of the general Justice's act, as amended. After showing that the general Justice's act gives no jurisdiction to Justices in special cases, Judge Christiancy says that it is clear that section 127, limiting costs, has no reference to costs in these special proceedings. This limitation applies only to cases of which Justices had jurisdiction under that act, or of which they might have jurisdiction by way of amendment to that act.

By the act of 1861, authority to try these forcible entry and detainer cases was given to Justices, giving Justices special powers in certain cases. From this act and its amendments he derives his powers, and by its provisions he is controlled.

The judgment of the Circuit Court of Hillsdale County, awarding a mandamus against the Justice, plaintiff in error, was reversed, and it was held that he might recover his costs against the relator.

SUPPLEMENT.

Abstracts of Decisions of the Supreme Court rendered at the July Term, 1871.

CLARK vs. BABCOCK.

Construction of contract. Question of damages.

Error to Bay Circuit.

Opinion by CAMPBELL, Ch. J.—Babcock sued Clark, his lessee for rent. The defense set up by way of recoupment was under a claim for damages, partly for delay in getting the property in condition for profitable use and partly for expenses in repairs. The lease running for one year from February 1, 1869, demised a steam saw-mill and salt works and its lands, with a reservation of certain houses and premises not used for business. On notice to be given before October 1, 1869, (which was given,) the lease was to be extended two years more, but subject to be defeated by the lessor upon notice and payment of certain sums named. The lease was renewed without countermand, the rent being \$10,000 a year. The sum of \$1,000 was to be paid to the lessor for repairs to be made by him, \$1,000 for insurance, and the balance as specifically provided. The lessor agreed to put the salt works in complete running order by March 15, and to put the mill in complete and good running order by April 15. In case the mill and salt works were not put in order, as provided for, then the lessee was to have the right to complete the necessary repairs and deduct the sums expended from the first payments. If Mr. Bennett was employed as the engineer, the consequences of any negligence on his part were to be borne by the lessor, and if through his carelessness the mill con-

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tinued idle for a time, a deduction was to be made from the rent to make the lessee good. The year was to be considered the sawing season of six months. The destruction of the mill by fire was to terminate the lease, and *pro rata* allowance was to be made in case of partial destruction by fire.

The lessor did not make the necessary repairs, and the lessee took possession and made them himself. The salt works were put in order by April 10, but the supply of brine being unsatisfactory, some work was done on the well afterwards, and the mill was got in order by May 11.

The Court below excluded all evidence of damages dependent on the preliminary delay in getting the property in running condition, and confined them (beyond the expenditure for repairs) to such as might arise out of the deficiency in the well. The ground was that the lease did not contemplate any redress for such preliminary failure beyond the right of the lessee to step in after March 15 and April 15 respectively and complete the work at the lessor's expense, to be applied as rent.

Held, That this ruling was correct. The parties must have had this very question before them, and yet fixed no rule of damages.— They probably would, had they contemplated that any special damage would be allowed. The mill was the principal thing and the salt works the accessory, and the provisions relating to the mill were especially regarded.

The other question related to the condition of the salt works and the losses supposed to have occurred through its defects. The claim was two-fold: one, that the lessor was bound to furnish a well capable of supplying sufficient water in quantity and quality for the profitable use of the works; second, that he was liable for having actually rendered the well less productive than it would have been without his work.

Held, That there was no foundation for the point, as the well was known to both parties at the time of the lease and it was leased with an equal understanding of the facts. No covenant seems to have entered into the matter. The Court examined the facts developed by the record concerning the second point, and concluded that they would not sustain the position taken.

The judgment was therefore affirmed with costs.

SIBLEY vs. BAKER *et al.*

SIBLEY vs. BAKER *et al.*

A gave B a mortgage on three parcels of land and subsequently a second mortgage on parcels known as parcels one and two of the same lands, and later, a mortgage on parcels two and three to C. B foreclosed the second mortgage, making C a party. On the sale, D became the purchaser of parcels one and two, subject to the first mortgage. On the foreclosure of the first mortgage. *Held*, That parcel number three should be sold first.

Appeal from Eaton Circuit.

Opinion by COOLEY, J.—This was a foreclosure case, and the questions relate to the marshalling of securities. The mortgagor first gave a mortgage to complainant on three parcels of land. Afterwards he gave a second mortgage to complainant on parcels known as one and two; later a third mortgage to defendant Winchester on parcels two and three. Complainant foreclosed the second mortgage making Winchester a party, and the decree which he obtained directed that parcel two, for Winchester's protection, should be sold last. The sale was made and the defendant Isbell became the purchaser of both pieces for a sum in the aggregate equalling the amount due upon the decree, taking them subject to the first mortgage. The present suit was brought for the foreclosure of the first mortgage, and in this it is shown that defendant Isbell has become the purchaser of complainant's interest in parcels one and two, but on the understanding that when sale is made on the foreclosure of this mortgage, parcel three shall be sold first.—The question was whether the decree should be in accordance with this understanding or whether defendant Winchester has not a right to demand that that the first parcel sold shall be parcel one.—The Circuit Court held that he had.

Complainant while holding the first and second mortgages had a right to have the latter protected on a foreclosure of the former, and the mortgagee must have had the right to have parcel three sold first since as the second mortgage only covered parcels one and two, if those were sold for the satisfaction of the first mortgage and enough should be raised from them, the effect would be that the second mortgage would be cut off. The giving of the third mortgage

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did not affect this question, and the third parcel must have remained the primary fund for the satisfaction of the first mortgage. A purchaser on the foreclosure of the second mortgage has a right to be protected in his purchase. Defendant Winchester must have understood this when he took the mortgage on the third parcel.—The same conclusion is reached by the application of the rule of inverse order of alienation.

It was argued for defendant Winchester that he had never until now had an opportunity to protect his interest in parcel three, because had he bid at the sale under the prior foreclosure a sum greater than the amount due on the decree, it must have been paid over to the mortgagor, and consequently would have been of no avail in reducing the securities. *Held*, that this was a mistake.—Any surplus must have been paid into Court, and would have been applied on one of the securities on the proper petition.

It was part of the arrangement when Isbell bought, that the third parcel should be sold first. The decree of the Circuit Court was accordingly ordered modified. The costs of Isbell were ordered taxed and added to the amount for which sale will be made under the decree.

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Error to Ionia Circuit.

Opinion by COOLEY, J.—*Held*, That the Circuit Court erred in directing the jury to deduct the 18,200 feet of lumber received by the plaintiffs from the whole amount to be delivered, when they entered upon the computation of damages. The effect was to prevent the plaintiffs from recovering in respect to this portion of the timber as if it had been delivered in compliance with the contract, and accepted by the plaintiffs in satisfaction of the undertaking of the defendants to that extent. But the record shows that it was not delivered as agreed, and that the plaintiffs were subjected to a heavy bill for freight in consequence; and there is nothing to show that there has been any waiver by the plaintiffs of their right to be

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compensated for the loss sustained by this breach of the agreement.

The Court also erred in instructing the jury that in getting at the proper measure of damages in respect to the lumber not delivered, they must allow the plaintiffs only the difference between the price they were to pay for the lumber, and the wholesale price at the place of delivery. The true question was not one of wholesale or retail price, but what it would have cost the plaintiffs to procure at the point of delivery and at the time when it was proper to supply themselves lumber of the kind and quality they were to receive on the contracts, and deducting the contract price from the cost.

Judgment reversed and a new trial ordered.

PRESTON vs. WHITNEY.

An instrument as follows: "\$70.

DETROIT, Nov. 25th, 1869.

On demand, after date, I promise to pay to the order of M. Preston, seventy dollars, value received, with 7 per cent. interest.

This note is valid as part pay for a piano-forte bought of me at retail price.

C. J. WHITNEY."

is a promissory note for the payment of money with the option of the payer to apply it as part payment on the purchase of a piano.

Error to Wayne Circuit.

Opinion by CHRISTIANCY, J.—The instrument upon which plaintiff sought to recover was in the following words:

"\$70.

DETROIT, Nov. 25th, 1869.

On demand, after date, I promise to pay to the order of M. Preston seventy dollars, value received, with 7 per cent. interest.

This note is valid as part pay for a piano-forte bought of me at retail price.

C. J. WHITNEY."

Held, That *prima facie*, and without any explanatory evidence *aliunde*, this instrument must be regarded as a promissory note for the payment of money with the option of the payer to apply it as part payment on the purchase of a piano, of the maker, at retail

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price. The memorandum at the foot of the instrument contains nothing repugnant to or inconsistent with the promise in the note itself to pay money.

Admitting that evidence to explain the intent of this memorandum was legally competent, the only evidence actually introduced for that purpose was that of Preston, who was called by the defendant, and whose testimony tended to show that the real intention of the instrument and of the parties was substantially in accordance with the construction which the Court derived from the instrument itself. The note was given for money due Preston which he had paid to defendant on a piano, under a written agreement to purchase, which was identified by the witness, and on which he had paid \$100. He had had the piano three months, and plaintiff had deducted \$30 for the use of the piano, and had given this note for the balance, the piano having been returned to and sold by defendant. When the note was given it was understood that if Preston should want to buy a piano he should buy it of defendant, but that he was not bound to do so, or to lose the value of the note if he did not. He had not made a demand on the defendant or applied to him in any way to have the note or the amount of it applied on the purchase of a piano. Defendant introduced no evidence to contradict this, and offered none except that connected with his offer to introduce the written contract and to prove its forfeiture. He offered the written contract and proposed to show by other testimony that the sum was forfeited by the plaintiff, on account of non-compliance with its terms as to payments, and the piano returned; that plaintiff proposed to purchase another piano of defendant, and urged defendant in the event of such purchase to allow him \$70 to apply on such purchase when made and that in pursuance thereof this note was given, and that nothing passed to defendant for said \$70 except what was paid on said contract. This offer was refused.

Held, That if there was anything in the contract and the facts proposed to be shown which would materially change the nature of the obligation created by the note and the other evidence introduced, or which would constitute a defense to the action or any part of it, then this refusal was error, otherwise not.

This agreement was one for a conditional sale only, the property remaining in the vendor as owner until paid for; that the property

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never passed to the vendee. And while it is provided expressly that for non-payment of any one of the several instalments, defendant might take possession and said agreement should become void, no provision is made for the forfeiture by plaintiff or the retention by defendant of any sum which might have been paid upon it before the forfeiture.

Held, That from the time of the taking of possession the agreement for the sale may be treated as void or terminated. The defendant, then, after taking possession, had \$100 of plaintiff's money in his hands, for which he should account on just and equitable principles. He would doubtless have the right to deduct from the amount a fair compensation for the use of the piano while plaintiff had it, or perhaps at his option the interest on the purchase price of it for that period, as well as for any reduction in value from injury beyond that arising from its legitimate use, and for any incidental expense in regaining possession, but he would have no right under this agreement to claim any forfeiture of all the money received by him beyond such reasonable compensation, as he has given no equivalent or consideration therefor. It appearing that \$30 was deducted from the \$100, and no evidence having been given or offered to show that this deduction was made for any other purpose than the compensation above alluded to, or that this defendant was justly entitled to anything more, the proposed evidence if given, would not have changed the legal effect of the note nor constitute any defense to the action.

Whether it would be competent to provide in such a contract for the forfeiture of all the several installments which might have been paid prior to default, or whether such a provision would be needed as a penalty according to the principles which distinguish penalties from stipulated damages, is a question not here decided. There was no error in the proceedings before the Justice which would operate to the prejudice of the defendant.

The judgment of the court below must be reversed, and that of the Justice affirmed, and the plaintiff must recover his costs in all the courts.

**Abstracts of Decisions of the Supreme Court rendered at the
October Term, 1871.**

**THE MANSFIELD, COLDWATER AND LAKE MICHIGAN RAILROAD
COMPANY vs. CLARK.**

1. In condemning lands for railroad purposes, questions of title are not to be considered by the jury.
2. The report of the jury or commissioners must distinctly set forth the necessity of the taking, and they cannot properly make one which will warrant the taking of the land unless satisfied not only that the particular land is needed for the construction of the work, but also that the work itself is one of public importance.
3. The proper course when a jury is required of persons of a particular qualification is for the order to direct the summoning of such persons.

Appeal from Branch Circuit.

Opinion by COOLEY, J.—This was an appeal from the finding of a jury in the matter of condemning land for railroad purposes.—The petition does not clearly show that Clark owned the premises in question. The jury appear not to have fully understood the matter, but inasmuch as Clark “claimed” to own this piece of land they assessed the damages they thought him entitled to; but whether they gave him the value of the land, or only the value of some doubtful claim, does not appear. It is not “claims” which are to be appropriated under the statute, but lands. A party might be seriously wronged if his freehold might be taken on an award of the jury of a mere nominal compensation because of their want of faith in the validity of his title. Questions of title are not to be determined by this jury, but may come up in a proceeding to settle the right of the money awarded.

Held, Also, that the verdict of the jury is defective in that it does not find the necessity for the taking of this property for the public use. What they say is that “it is necessary that said real

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estate and property should be taken for the purposes of said company." This is not the finding required by the constitution either in form or substance. The report of the jury or commissioners must distinctly set forth the necessity of the taking, and they cannot properly make one which will warrant the taking of the land unless satisfied not only that the particular land is needed for the construction of the work, but also that the work itself is one of public importance.

Held further, That the objection that the jurors are not affirmatively sworn to be freeholders is not well taken. No challenge was interposed, nor was there any showing that any of the jurors were disqualified. On the contrary the claimant expressed himself satisfied with the jury when they were impaneled. Had there been no appearance of the claimant, or no facts operating as a waiver, the case would have been different. The proper course when a jury is required of persons of a particular qualification is for the order to direct the summoning of such persons. This is only an ordinary application of the general and very first rule, that in proceedings to take the property of the citizen against his will, all the conditions to the taking which have been prescribed by the law must affirmatively appear to have existed.

The proceedings in this case being void they are set aside with costs.

NEW YORK CENTRAL INSURANCE COMPANY vs. WATSON.

A clause in a policy of insurance provided that the same should be void in case any other insurance should be made upon the property without the written consent of the company, *Held*, That subsequent insurance without such written consent rendered the first policy void.

Error to Wayne Circuit.

Opinion by CAMPBELL, C. J.—Two policies of insurance were issued by plaintiffs in error to Martin & Longhead, by whom, after

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a loss, they were assigned to defendant in error, who sued and recovered judgment upon them in the court below.

They contained, among other things, a clause rendering them void in case any other insurance had been made or should be made upon the property and not consented to in writing by the company. After they had been executed and become operative, another insurance was effected with the Republic Insurance Company, and never consented to in writing. On the trial the Circuit Judge, under exception, left it to the jury to determine whether or not there had been any waiver of this condition or of the forfeiture under it.

Held, That there was nothing in the case to authorize this matter to be submitted to a jury. As already held in *Western Insurance Company vs. Riker*, 10 Mich., 279, and *Security Insurance Company, vs. Fay*, in our reports, the policies became absolutely void at once upon the obtaining of the last insurance without consent. Nothing could waive the defect except a new contract upon a valid consideration, or such conduct as by misleading the insured to their prejudice, would operate as an estoppel. The case shows no features of this kind.

The objection that the subsequent insurance was not proved has nothing to rest upon. The fact that more property was included in the Republic policy is immaterial. The deliberate statement of this policy in the proofs of loss dispensed with any other proof of it, and the rule that the proofs are no evidence in favor of the insured does not preclude them from operating as admissions.

Judgment reversed with costs, and a new trial granted.

RAMSAY vs. KITTREDGE

The statute provides that, "If upon the trial of any cause the plaintiff's claim shall be reduced by set-off, or any other fact shall appear which will entitle either party to costs or to double costs, the Judge holding the court shall, upon the application of either party, either before or after verdict rendered, cause an entry to be made in the minutes of the court specifying that such fact appeared; and no evidence shall be received by any taxing officer of such matter other than a certified copy of such minutes or the certificate

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of the Judge who tried the cause." *Held*, That the nature of this provision very clearly imported that in the order of proceedings the application for the entry, if not the entry itself, should be made before judgment and not after it in order to apply to the judgment.

Error to St. Clair Circuit.

Opinion by GRAVES, J.—Ramsay sued Kittredge in general assumpsit and the case was tried without a jury. The trial commenced at the May term of 1867, and was concluded at the January term of 1869. No special finding was made, but at the April term of 1869 judgment for the plaintiff was entered for damages, \$96 35 and costs. At the ensuing September term the record was amended by an entry in the case in these terms: "It appearing to the Court that there is an error in the entry of the judgment in this cause on the 23d of April, 1869, in so far as the said record purports to *give costs to said plaintiff*, it is hereby ordered that said entry be corrected so that the said defendant shall recover his costs and charges by him about his suit in that behalf expended, to be taxed. That the damages to said plaintiff shall be deducted from the amount of costs to be taxed by said defendant as aforesaid, and that said defendant do recover the residue of his costs and charges, and that he have execution therefor."

The record having been so amended, the plaintiff, subsequently, and in January last, sued out this writ of error, and the error he alleges, is that costs were awarded to the defendant. But as the judgment upon its face is regular, and does not appear to be subject to the objection taken, the plaintiff in error relies upon another paper found in the return to support his assignment of error and impeach the judgment. That paper is omitted in the cause, and seems to have been made some time after the judgment. It is without date, and was evidently framed under section 5636 *Compiled Laws*. It reads as follows: "On the application of Messrs. Conger & Harris, plaintiff's attorneys in the above entitled cause, I, James S. Dewey, Circuit Judge, who held the term of said court at which the above entitled cause was tried, and who rendered judgment in the same, hereby certify that upon the trial of said cause, the claim of the plaintiff as established exceeded the sum of \$200; and the same was reduced by set-off to the sum for which judgment was rendered, and I hereby direct that an entry that such fact appeared be made in the minutes of said court, of said trial." The

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section supposed to authorize this paper is a part of the statute regulating the taxation of costs, and is as follows :

" If upon the trial of any cause the plaintiff's claim shall be reduced by set off, or any other fact shall appear which will entitle either party to costs or to double costs, the Judge holding the court shall, upon the application of either party, either before or after verdict rendered, cause an entry to be made in the minutes of the court specifying that such fact appeared ; and no evidence shall be received by any taxing officer of such matter other than a certified copy of such minutes or the certificate of the Judge who tried the cause."

Held, That the nature of this provision very clearly imported that in the order of proceedings the application for the entry, if not the entry itself, should be made before judgment and not after it in order to apply to the judgment. It is the judgment which determines which party is to recover costs, and not the certificate of the Judge ; and the taxing officer, with or without the certificate, has no power to tax contrary to the judgment. In cases where the statute applies, the entry is needed to show which party is to recover costs, or double costs, in order that the judgment upon the facts contained in such entry may be put in proper form ; and hence the entry which is to furnish the information for constructing the judgment ought to precede and not follow it. The judgment being one regularly made, and entry or certificate framed on this statute could have no influence on it

The terms of the statute also indicate that the application and entry consequent upon it should be made before judgment. The application is to be made before or after verdict to the Judge holding the Court, but not after judgment. It was intended to allow the application to be made at any time between the close of the evidence, when the Judge would be possessed of the facts, and the time for entering judgment, when the facts would be needed to fix the character of the judgment. As the application in this instance and the certificate founded upon it, were made after the judgment, the certificate is not legally adequate to impeach or affect the judgment or writ of error.

No opinion was given on the power or duty of the Circuit

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Court to amend, either with or without an entry or certificate, when the costs have been wrongly awarded.

Judgment affirmed with costs.

THE PEOPLE *ex rel.* THE DETROIT FIRE AND MARINE INSURANCE COMPANY vs. THE CIRCUIT JUDGE FOR THE COUNTY OF SAGINAW.

In construing the statute which provides that suits may be brought against corporations in the same manner as against individuals, and that process may be served on the presiding officer, the cashier, the secretary or the treasurer thereof; or if there be no such officer or none can be found, such service may be made on such other officer or member of such corporation, or in such other manner as the court in which the suit is brought may direct, *Held*, That substituted service can only be made in that county where the corporation is required or expected to have those persons present who have the immediate supervision of its general office business, and where some one may fairly be supposed to be ready at all times to respond for it.

Mandamus.

Opinion by CAMPBELL, C. J.—The Circuit Judge, upon affidavit of W. S. Tenant, attorney for John Dietrich, that the relator had no presiding officer, cashier, secretary or treasurer within the limits of that county, directed service of process to be made upon one Edward P. Allen, an agent of the company in that county.—Application is made for a mandamus to compel the order to be vacated. The relator is a Michigan company, having its business in Detroit, where the officers reside.

The power in controversy is claimed to result from section 4835 of the *Compiled Laws*, which provides that suits may be brought against corporations in the same manner as against individuals, and that process may be served on the presiding officer, the cashier, the secretary or the treasurer thereof; or, if there be no such officer, or none can be found, such service may be made on such other officer or member of such corporation, or in such other manner as the court in which the suit is brought may direct.

The point to be decided was, whether a corporation could be sued in any county whatever, and substituted service be had against it

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if its officers were not found there; or, whether such substituted service is only lawful where the officers are not to be found in the county where the corporation is in law located. Whether service may lawfully be made elsewhere on one of the officers, is a question not before the Court.

Held, That the substituted service can only be made in that county where the corporation is required or expected to have those persons present who have the immediate supervision of its general office business, and where some one may fairly be supposable to be ready at all times to respond for it. The principle is well settled that the residence of the corporation is where its chief business office is, and our statutes regarding the commencement of suit recognize the practice of serving process in the county in which at least one of the parties resides. Legitimate service could doubtless have been obtained in the county of Wayne, and the litigation could have been disposed of there.

Mandamus granted vacating the order of the Circuit Judge with costs against the plaintiff.

 WORTHINGTON vs. HANNA.

A has a chattel mortgage executed by B. The Sheriff levies upon the same to satisfy a judgment in favor of C against B and sells the same. In an action brought by A against the Sheriff for the conversion, *Held*, That the rights of mortgagees can only be divested by payment or tender of payment of their whole debt. Every security holder has a right to seek his money out of his security without proceeding against his debtor's personal responsibility; and the legal value of every security is the means it will furnish of obtaining satisfaction out of the property.

While the Court will not assume judicially to know what any foreign law is, there is no principle which will justify them in holding anything void under foreign law which is lawful here until the variance is shown. To that extent it may be presumed that a conformity exists between our laws and foreign laws. The Court will make no presumption that a transaction valid under our laws is not valid elsewhere.

Where an appraisement is made in pursuance of a statute under oath, in the course of the proceedings under which the party himself has acted, it would be going too far to say that such a valuation would be entirely worthless as evidence against him.

Error to St. Joseph Circuit.

Opinion by CAMERON, Ch. J.—Mrs. Hanna sued Worthing-

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ton for having, as Sheriff, seized and sold certain chattels on process against Andrew Hanna, which had been mortgaged to her, and which were in the possession of the firm of McDougall, Nicholas & Abbott, under a security of the same date, which provided that they should take possession and sell goods to pay their own claim, and then turn over any surplus of goods or proceeds to her as second mortgagee. The Sheriff seized the property into his own possession under a writ of attachment, and sold it in parcels to different persons without making any provision for either of the mortgagees. The first questions arise upon the pleadings. The first count of the declaration was in trover; but the parties seem to have supposed that trover would not lie in such a case, and no evidence was offered under it. The question, therefore, is not before the Court. The second count set out the rights of Mrs. Hanna under the second mortgage, which was recited at length, stated the mortgage of McDougall and others according to its effect and their possession under it, and then averred a seizure and conversion by sale to divers persons, whereby she was injured in her estate and deprived of her security on the goods, to her damage. \$3,000, etc. This declaration was not demurred to, but it was insisted that the declaration should have shown the insolvency of the mortgagors and averred that the mortgagees had no other claim.

Held, That the cause of grievance, if actionable at all, could not have been set forth more clearly or specifically, and the objection is not well founded. This objection is based upon an idea that there is the same substantial difference between the damage done to a mortgagee in possession and to a mortgagee out of possession by the seizure and confiscation of the goods. Possession or present right of possession can make no difference in regard to the quantum of damages within the extent of the security. The doctrine alleged would be equivalent to holding that no person could have a legal right to complain of being deprived of a security unless he could show the insolvency of his debtor; or, in other words, that any wrong-doer could, at his pleasure, compel the holder of a security against a solvent party to look only to the personal remedy and give up the security. This is too unreasonable a doctrine to be entertained. In a case like this our own statutes furnish a positive rule. The rights of mortgagees can only be divested by payment or ten-

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der of payment of their whole debt. Every security holder has a right to seek his money out of his security without proceeding against his debtor's personal responsibility; and the legal value of every security is the means it will furnish of obtaining satisfaction out of the property. The count was sufficient, and all testimony relating to the solvency or insolvency of the mortgagor was surplusage.

It was also claimed that the mortgagee could not sue the Sheriff for the conversion, but should seek out the purchasers and recover the goods from them.

Held, That the statute does not permit the Sheriff or the purchaser to take mortgaged property away from a mortgagee in possession and sell it in parcels. It only allows the sale to be made "subject to the lien of the mortgage or pledge existing thereon;" and it is only upon payment or tender of payment, or performance, that the purchaser obtains any rights whatever as against the mortgagee. The right lawfully sold is merely the right of redemption, and this is not apportionable. When the Sheriff departed from his statutory duty and sold in parcels, he became a trespasser, and the sale was an unlawful conversion. The mortgagees were not bound to follow the property unless they chose.

It is also claimed that, inasmuch as this mortgage was given by a husband to secure a debt due to his wife, which she purchased in New York from another holder, paying therefor out of her personal estate derived from her own father, it cannot be assumed that the common law rule giving a husband all his wife's personality has been abolished in that State, and that it must be assumed that the common law rule still prevails there, and that the mortgage is therefore void.

Held, That while this Court cannot assume judicially to know what any foreign law is, there is no principle which will justify them in holding anything void under foreign law which is lawful here until the variance is shown. To that extent it may be presumed that a conformity exists between our laws and foreign laws. This Court will make no presumption that a transaction valid under our laws is not valid elsewhere.

It is also alleged as error that the Court refused to instruct the jury to disregard the appraisal made under the attach-

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ment proceedings in estimating the value of the goods. Plaintiff in error was allowed to introduce testimony on this subject, and the appraisal was left to the jury for what it was worth, and not as in any way conclusive.

Held, That there was no objection to this. Where an appraisal is made in pursuance of a statute, under oath, in the course of the proceedings under which the party has himself acted, and he himself selected the appraisers, it would be going too far to say that such a valuation is entirely worthless as evidence against him.—There is nothing in the record which affects the correctness of the judgment, which is affirmed with costs.

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Error to Hillsdale Circuit.

Opinion by COOLEY, J.—Defendant and George H. Williamson were jointly informed against for the rape of Louisa Towers.—From the testimony it seems that the girl had resided in the family of defendant. She testified to this fact on the trial, and also to the fact that he was her uncle by marriage. The admission of this evidence was among the errors charged, which were exceedingly numerous, but the Court held that it was properly received.

She stated that Williamson came to her mother's house June 5, 1870, and got her to accompany him in a buggy to meeting, as he said. About half a mile from the house they met defendant, who took Williamson's place in the buggy, against the girl's remonstrances, and drove it to a piece of woods. There he made her get out, and by threats succeeded in violating her person. It was held that what he said to her immediately after the outrage was material testimony, and it divulged that he compelled her to submit to the embraces of Williamson also, who soon came up.

Defendant, in threatening witness, told her that if she did not submit he would take her where she would not get back home again. The witness also testified that she was afraid of the defendant, be-

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cause it ran in the family to kill folks, and she had seen him abuse his wife. *Held*, That this evidence was properly received. The girl it appears was only 16 years of age.

A witness for the defence testified that at a previous time to that of the alleged rape, he had had sexual intercourse with the girl, but after testifying to that fact he was not allowed to go into other particulars tending to throw suspicion on her chastity. *Held*, That this was correct, the material fact having been proved.

The charges of the Court were held correct, and the indictment, charging defendant and Williamson jointly with the commission of rape, was considered good, as both the parties were principals.

Conviction affirmed.

MILLER et al. vs. MORSE et al.

Complainants were sued in a court of law and judgment was rendered against them; a new trial was denied, and execution issued. Bill filed to restrain the sale of property on the execution and judgment set aside. *Held*, That the case was probably one in which all the claims of complainants have been urged in a court of law, and as no showing was made here that any stronger case could be made again, no ground for the interference of a court of equity existed.

Appeal from Kent Circuit.

Opinion by COOLEY, J.—Complainants set out a contract between themselves and the defendants, Morse and another, for the delivery by the latter to the former of a quantity of stone; aver that delay occurred on the part of Morse and Brooks to perform, and that on April 10, 1868, they requested complainants to consent to an abandonment of the contract, which consent was given, and the same was cancelled and abandoned practically, though the paper writings were not destroyed—That notwithstanding such arrangement, Morse and Brooks, combining and confederating with one Sholes, in June, 1868 brought action on the contract against complainants, in the Circuit Court for the county of Kent, for pretended damages resulting from a pretended breach of it. That the case came to

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trial, and the defendants wickedly and falsely swore that the contract had never been abandoned. That the plaintiffs recovered judgment for \$757 69 and costs, upon which an execution was issued and handed to the Sheriff, who has levied upon complainant's property. That a new trial has been applied for and refused, so that the complainants have now no relief except in a court of equity. They prayed for an injunction to restrain the selling of their property under the execution that the judgment might be set aside, and for the usual other relief. Defendants put in a general demurrer and the bill was dismissed.

Held, That the bill was properly dismissed. It did not appear from the record that complainants were present when defendant testified that the contract was still in force, or that they have taken any measures to show that it was cancelled, though they must have been apprised of the claim that it was of validity. The case was probably one in which all the claims of complainants have been urged in a court of law, and as no showing was made here that any stronger case could be made again, no ground for the interference of a court of equity existed.

Decree affirmed.

NEAR vs. MITCHELL.

A sued B. B pleaded the "general issue" and gave notice that garnishee proceedings were pending against him by C as debtor of plaintiff. C, however failed in his suit against A, whereupon A demanded judgment against B. The Circuit Judge held that the suit was prematurely brought and could not be maintained when it was shown that a garnishee proceeding had been commenced against the defendant as plaintiff's debtor already. *Held*, That in this decision the Circuit Judge erred. The proper course in this case was for defendant to plead in abatement and not in bar, if he would take advantage of the pendency of the other suit.

Error to Ingham Circuit.

Opinion by CAMPBELL, C. J.—This was an action of assumpsit. Defendant pleaded the general issue and gave notice that

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he would show that at the time the suit was commenced, garnishee proceedings were pending against him as debtor of the plaintiff, in a suit brought by one Hubert. The case was sent to a referee, who reported that defendant was indebted to the plaintiff in the sum of \$255 75 and that when the suit was commenced, garnishee proceedings were pending as set forth in the notice, but that they had since been determined by the rendition of judgment against Hubert in the principal case. On the coming in of the report defendant moved for judgment upon it.

The Circuit Judge held that the suit was prematurely brought and could not be maintained when it was shown that a garnishee proceeding had been commenced against the defendant as plaintiff's debtor already. *Held*, That in this decision the Circuit Judge erred. The proper course in the case was for defendant to plead in abatement, not in bar, if he would take advantage of the pendency of the other suit. The statute does not change this, but simply suspends the creditor's right to recover until the garnishee proceeding shall be determined.

The judgment, together with all proceedings subsequent to the report of the referee, was reversed and the cause was remanded for further proceedings, with the costs of the Supreme Court.

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The statute provides that "The persons having received the greatest number of votes given for any office at such election, shall be deemed and declared duly elected." It does not under any circumstances allow a minority candidate to be deemed elected, whether the person for whom the majority seem to have voted can or cannot be installed.

Quo Warranto

Opinion by CAMPBELL, C. J.—This was a proceeding by *quo warranto* to enquire into the respondent's title to the office of Supervisor of the township of Rogers in Alpena County.—The respondent's plea sets up that 150 votes were cast at the

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election, of which relator had 2, respondent 69, and 72 ballots were cast for "L. C. Crawford," whereby he declared himself elected.

A statement of facts was agreed upon and used at the hearing, but it appears that it did not have the signature of the Attorney General. It was held in *People vs. Pratt*, 15 Mich., 184, that the Attorney General was the only person whose stipulation could be acted upon so as to affect the People.

The Court, however, can consider any admissions in the plea as binding on the respondent, and the plea was deemed an admission that respondent had no title, because it shows affirmatively that he did not receive the greatest number of votes cast. The statute provides that "The persons having received the greatest number of votes given for any office at such election, shall be deemed and declared duly elected." It does not under any circumstances allow a minority candidate to be deemed elected, whether the person for whom the majority seem to have voted can or cannot be installed. Whether in this case there is any such person as L. C. Crawford does not change the state of the canvass, or make 69 a larger number than 72.

Judgment of ouster must go against the defendant with costs to the People. Defendant cannot, however, by his statements or admissions, establish any rights in others. His default or his admissions may preclude himself, but can go no further. The title of a relator can only be adjudicated when upon the facts lawfully established in the cause his right necessarily appears from the finding. It was not part of the principal issue in this cause, and disproving respondent's right does not establish his. As the plea raised no issue it was thought questionable whether proofs could be taken under it at all in regard to the rights of the relator, when there is nothing which respondent could try. But, without deciding this, the Court could not act upon the agreed case, and could not give judgment except upon respondent's title.

SANFORD vs. THE C. & L. S. R. R. Co.

SANFORD vs. THE CHICAGO & LAKE SHORE RAILROAD COMPANY.

Where a jury is called to determine the necessity for taking lands for a railroad, and to fix and determine the compensation therefor the verdict must be unanimous in favor of the petition, or no rights in such lands can be acquired thereunder.

Requisites of petition for condemnation of lands for railroads, considered.

Where the lands sought to be appropriated consist of a strip running through several distinct parcels, the finding of the jury should indicate the damages to each separate and distinct parcel.

Appeal from Berrien Circuit.

Opinion by CAMPBELL, C. J.—The proceedings appealed from were taken under the General Railroad Law to condemn certain lands for a right of way. The appellant demanded a jury, and the verdict was rendered and signed by eight out of twelve. The clause in the constitution under which the jury was demanded declares that when, except to be made by the State, the compensation to be made when property is taken, shall be ascertained by a jury of twelve freeholders residing in the vicinity of said property, or by not less than three commissioners appointed by a court of record as shall be prescribed by law. The section of the law referring to the powers of commissioners seems to contemplate that a majority of them may determine the compensation. It also declares that the jury shall proceed to determine the necessity of taking and the compensation in the same manner and with like effect as is provided in this section in the case of commissioners, but they shall all be present and act together during the proceedings. It is claimed that if the jury are all present and acting, the analogy to the functions of commissioners renders the verdict of a jury valid.

Held, That no change had been made in the requisite of an unanimous verdict. Juries of inquest were well known to the common law, and unlike petit juries they might consist of 12 men, or sometimes of more, but their verdicts were always required to be

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unanimous. It is doubtful whether it was ever supposed that a verdict of jurymen in any proceeding would be valid if not unanimous. Under our whole system of railroad charters, previous to our present Constitution, the juries selected to fix damages have been styled juries of inquest. They were neither called nor treated as mere appraisers. Our Constitution now requires 12 freeholders, and its provisions are more stringent than in New York. It will not permit the jury, so specifically provided for, to be changed into a mere board of appraisers or to be treated as anything but a jury of inquest. The verdict in this case was therefore a nullity.

The petition was objected to as insufficient, because instead of declaring it to be the intention of the company in good faith to construct and finish a railroad from and to the place named in its articles of association, it avers such an intention only between certain points which are named, including thereby Division 2 of the projected road. The section under which the petition was filed expressly requires the former averment. But under an amendatory statute of 1867 companies were, under certain circumstances, authorized to designate a division of not less than 15 consecutive miles or construction, with full power and authority to construct, operate and maintain a railroad upon the division thus designated. The Court held that when the company has complied with the statute and designated such a division, under circumstances authorizing it an intention confined by terms to that part of the road would be sufficient, and the provisions of the section prescribing the contents of the petition may be modified according to the amendatory act, inasmuch as under the latter no forfeiture arises from a failure to build other parts of the road. But the petition must thus be one thing or the other, and if it does not contain a compliance with the original section, it should aver such facts as to bring it within the amendment. It does not appear that there was any authority for setting apart Division No. 2, nor that it is a division of not less than 15 consecutive miles, all of which should be made to appear in some way.

It was also objected that the lands proposed to be taken were not specifically described as they should be, but are set forth as two continuous sections, not showing in which portions the various persons described as the owners are interested. This objection was

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considered with another that grew out of it ; that the damages are not apportioned, but the value of the entire land taken is given in one sum of \$2,000. It was held that the description should have gone more into detail than it has in this case. Here it contains little more than a general description of the central line of the road and of the location of the way by reference to it, giving no information as to how smaller parcels may be affected although streets are evidently crossed and a village is entered. By the statute, the fact of inability to acquire title amicably is made a jurisdictional fact and might be controverted.

A verdict giving a round sum as damages for a continuous strip of land crossing several parcels, does not accomplish anything whatever concerning the rights of the several owners. The land may be different in quality and value ; parts may be improved and parts unimproved ; small lots may be ruined and larger ones may be damaged but a trifle. Each party interested is entitled to have a finding upon his own damages and the compensation to be made for it.

It is evidently expected under the statute, that when any person demands a jury, they will be able from the petition itself to understand what property is to be the subject of their investigation and what necessity is claimed to exist for taking it. The necessity is not the same in all cases. The petition in this case undertook to follow the language of the statute so literally as to prevent the several interests from appearing with any degree of certainty. And the result was that the verdict following the same ambiguous course, has made no finding at all on the rights of the party appealing.

The whole proceedings, so far as they concern the appellant, are quashed, and if the company desire to obtain a condemnation of his lands they must commence new ones. He is entitled to all the costs.

INDEX TO CIRCUIT COURT CASES.

ABATEMENT.

1. Where the defendant pleads in abatement the mis-joinder of the plaintiffs, the plaintiffs hold the affirmative and must begin.—*McRoberts vs. Eastman.* 35
2. Where issue is joined upon a plea in abatement, and the decision is adverse to the plea—whether *interlocutory* judgment should be entered and plaintiff's damages be *subsequently* assessed, *quere.* *Id.*
3. Suit commenced in Wayne Circuit by declaration, in assumpsit. Neither party resided in Wayne County. Defendant plead in abatement the want of jurisdiction in the Court, the statute providing that actions of this kind shall be *tried* in the county where one of the parties shall reside at the time of commencement of suit. *Held*, on demurrer to plea in abatement that the law referred to does not prevent the *commencement* of a suit in the county where neither party resides, but only the *trial* of the cause, and that the only effect of the law in such case is to remove the cause for *trial* into a county in which one of the parties resided at the time of the commencement of the suit.—*Clark vs. Spencer.* 78

ACTION.

1. Trover for logs cut from land is not a local action but will be tried in any court obtaining jurisdiction of the person — *Stilson vs. Greeley.* 222

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2. Title to land cannot be tried in a transitory action against the actual occupant claiming adverse title. *Id.*
See JURISDICTION, 1, 2.

ADULTERY.

1. A person guilty of adultery may be convicted of fornication, where the information is for fornication, as adultery embraces fornication. And where a person is convicted of adultery he may be convicted of fornication.—*People vs. Rouse.* 209

AFFIDAVITS.

1. Whether, upon a motion to dissolve an injunction, after answer, the complainant may read affidavits to contradict the answer,—*quere.*—*Gray vs. Koch.* 119
See ATTACHMENT 4, 6, 7—PROMISSORY NOTE, 5—CAPIAS.

AGENT.

1. An agent may bind an undisclosed principal, and may so negotiate for him as to make him a party to a contract without naming him.—*McRoberts vs. Eastman.* 35
2. Where one assumes to act as agent for another in incurring a liability, when in fact he has no authority to bind the person in whose name he assumes to act, he will be held liable himself as principal.—*Holland vs. Stewart.* 39

ALIMONY.

1. When the wife files her bill for divorce, temporary alimony will be allowed, notwithstanding the equities of the bill are denied in the answer. And where the answer on oath charges the complainant with ill conduct, she will be allowed alimony, if such conduct be denied by affidavit.—*Hoover vs. Hoover,* 27
See CIRCUIT COURT COMMISSIONER.

AMENDMENT.

1. A defective certificate of sale of real estate, upon execution, may be amended by the person making the sale, even after his term of office has expired.—*Bisby vs. Rowe.* 152

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2. *Held*, That the declaration in trespass, in a suit certified to this Court on a plea of title from a Justice's Court, may be amended so as to make the description conform to the description of the premises in the notice attached to the general issue; it being then apparent that when the pleadings were made up in the Justice's Court the error was overlooked by both parties.—*Farrar vs. Highway Commissioners*. 106

APPEARANCE.

See ATTACHMENT, 3.

APPEAL.

1. A Circuit Court has no general discretion to allow an appeal from the judgment of a Justice of the Peace based upon the equities of the case. Such an appeal can be allowed under Sec. 190, of the Justice's Act, only where the party desiring to appeal was prevented from doing so within five days after judgment rendered, by circumstances beyond his control, and it is not beyond his control to see that the officer before whom he swears to an affidavit, signs the *jurat*, before he files it with the Justice.—*Catvert vs. McNaughton*. 8
See ASSESSMENT ROLL—ASSIGNMENT—LICENSE.

ASSESSMENT ROLL.

See TAX TITLE.

ASSIGNMENT.

See LICENSE.

ATTACHMENT.

1. Where a constable makes return to a writ of attachment, issued by a Justice of the Peace, that he left a copy of the writ and inventory with the person in whose possession he found the goods, but omitted to state whether the defendant has or has not "a last place of residence in the

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county," the defendant not appearing in the suit, the Justice is not authorized to retain the case; and a judgment rendered against the defendant under such circumstances, will be reversed.—*Percival vs. Tucker.* 219

2. A writ of attachment issued from a Justice's Court must be served by seizing the goods of the debtor and by leaving a copy of the writ and inventory with the defendant, if he can be found in the county; if not so found, such copies must be left at his last place of residence if there be any such place in the county, and if not, then by leaving the same with any person in whose possession the goods may be found; and unless the copies are served in one or the other of the modes indicated, the Court acquires no jurisdiction over the defendant.—*O'Hara vs. McEnny.* 164
3. Where in an attachment proceeding the goods were seized, but no such service was made as to give the Court jurisdiction over the person of the defendant, and on the return of the writ the Justice continued the cause to a future day, and the defendant appeared before the Justice prior to the adjourned day and demanded trial. *Held*, that such appearance was a waiver of service of process, and that the defendant thereby subjected his person to the jurisdiction of the Justice. *Id*
4. *Held*, An affidavit to entitle a person to an attachment under sec. 3670, *Com. Laws*, is insufficient to authorize the issue of the writ, in which deponent swore, "he believed the defendant was about to abscond," &c.—*Anonymous.* 118
5. A bond for an attachment in a Justice's Court, which has but one surety is irregular, merely, and may be amended.—*Id*
6. An affidavit for an attachment under sec. 4743, *Comp. Laws*, stated in positive language the amount of the indebtedness of the defendant to the plaintiff, at a certain sum, without using the qualifying words of the statute, "as near as may be." *Held*, sufficient.—*Burns vs. Kinnie.* 63
7. The affidavit also stated in positive terms the non-residence of the defendant, without using the prefatory statement "that the deponent knows," or "that the deponent has good reason to believe," specified in the statute. *Held*, sufficient, and that in each particular there was a substantial compliance with the statute. *Id.*
See Costs.

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BIDDERS BOND.

1. Where a city charter provides that certain public works shall be let to the lowest responsible bidder, with sureties, and that the same shall be advertised, *Held*, That the following provision in the advertisement for the work, by the Controller, viz: "Builders are required to file a satisfactory bond with the Controller before the proposals are opened, conditioned that should they be found to be the lowest bidders they will enter into a contract, with good and sufficient sureties to perform the work," was warranted by the charter, and that a party bidding, though the lowest bidder, has no right to insist upon the acceptance of his bid without first filing a bidders' bond.—*Fisher vs. Detroit.* 235

BILL OF EXCEPTIONS.

1. An order entered after verdict and *before* judgment, extending time for settling bill of exceptions is as valid and binding as if made *after* judgment.—*Littell vs. Hinman.* 75

BILL TO QUIET TITLE.

1. In order to maintain a suit to quiet title, the complainant must establish a clear legal or equitable title in himself.—*Cummin vs. Abbott.* 83
2. The grantor of complainant having made an assignment under the laws of Pennsylvania, for the benefit of creditors, and having subsequently assented to a conveyance from his grantors to defendant (the one to him being lost and not of record) had no title to convey to the complainant, and his assent to the conveyance to defendant must be taken as conveying title to defendant, where no record title from defendant's grantor intervened. *Id.*

BOARD OF PUBLIC WORKS.

See CASE OF DETROIT VS. BOARD OF PUB. WORKS. 186

BONA FIDES.

1. Whenever it appears that the consideration of a paper be-

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tween the original parties has been procured by fraud, proof of such fraud throws upon the holder the burden of proving that he got it in good faith and gave value for it. *Miller vs. Finley.* 231.

2. A *bona fide* holder of negotiable paper, is one who acquires the paper in good faith, for a valuable consideration, from one capable of transferring the paper, without notice of the consideration, or of attending facts and circumstances which would naturally lead an honest man, using ordinary caution to make farther inquiries. *Id.*
3. The rule is, that an innocent purchaser of commercial paper takes it stripped of all equities between the original parties to it, but where the instrument is not the contract of the parties, where it is different from what they made it or intended to make it, it cannot be enforced in the hands of any one, unless indeed, the instrument in its changed form has been ratified by the parties so as make it their contract. *Id.*
4. Adding the name of another drawer or maker to a bill or note, is a material alteration, such as will discharge the original party not consenting thereto. *Id.*
5. Where it was claimed that the payee named in a promissory note procured the signature of the maker while such maker was intoxicated, the intoxication being brought about by the payee named in the note, *Held*, That if the maker was so intoxicated as to be unconscious when he signed the note, such note would be void, even in the hands of a *bona fide* holder.

BONDS.

1. A Sheriff and his sureties in a suit upon his official bond, cannot object to any irregularity short of a jurisdictional defect in the judgement upon which the execution was issued, for the non-return of which a breach in the bond is assigned.—*People vs. Dumpley.* 197.
2. The failure of the Sheriff to give a new annual bond, as required by the statute, will not release his sureties from liability on account of process placed in his hands for execution before such renewal is required. *Id.*
3. Some proceeding is necessary to declare his office vacant in case he fails to give such new bond, and he and his sure

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ties cannot avail themselves of the supposed vacancy as a defence to the action on the bond, without a special plea, or special notice of the neglect as a defence. *Id.*
See ATTACHMENT, 5.

CAPIAS.

1. In this State there is by statute no non-bailable *capias* by which suits may be commenced, but in all suits commenced by *capias* there must be endorsed on the writ an order to hold to bail, made by the Circuit Judge or Circuit Court Commissioner, on a proper affidavit. *Terrill vs. Grove.* 3.
2. This affidavit to hold bail must be positive, and must make out a *prima facie* case against the defendant. *Id.*
3. An affidavit to hold to bail in an action for alleged representations on a sale or exchange of lands, if such action may be commenced by *capias*, should allege, in substance, that the defendant knew the representations to be false, and that they were made by him with the intent to deceive and defraud the plaintiff. *Id.*

CIRCUIT COURT COMMISSIONER.

1. A Circuit Court Commissioner has no authority to make an order allowing alimony.—*Thorp vs. Thorp.* 209
2. Circuit Court Commissioners have no jurisdiction to act as Injunction Masters in cases not pending in the county in which they reside.—*Mason vs. Stawson.* 117

CONSTITUTIONAL LAW.

1. The provisions of the Act of 1865, "to encourage the erection and support of water-power manufactories," (excepting perhaps the last clause of section 5.) are not unconstitutional.—*Hartwell*, petition of 97

COSTS.

1. Plaintiff brought assumpsit on promissory note for \$114

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- and recovered that sum. *Held*, that the defendant was entitled to costs.—*Mattison vs. Butterfield*. 69
2. Costs are awarded only by statute.—*Hartwell*, petition of. 97
3. In proceedings had under the Act of 1865, "to encourage the erection and support of water power manufactories," the respondent is not entitled to costs, except in those cases in which the petitioner moves for a jury, to re-assess the damages reported by the committee, and the jury fail to lessen the damages. The words "fees and expenses" in Sec. 11, embrace only the fees of officers of the Court, and the committee or jury. *Id.*
4. Rule in appealed cases.—*Lorman vs. Seitz*. 104
5. The plaintiff in error, in *certiorari* cases, is entitled to an attorney fee of \$15, in case the judgment is reversed.—*Dodge vs. Corbin*. 140
6. Sub. 5, of Sec. 1, Act 28, *S. L.*, 1869, has no application to *certiorari* cases. *Id.*
7. Under Sec. 5597 of the *Compiled Laws*, as amended by the act of 1871, (*Laws of 1871*, page 192,) the plaintiff, in an action upon contract for the recovery of damages, is not entitled to costs unless the damages recovered by him exceed \$100—but the defendant is in such case, under Sec. 5600, *C. L.*, entitled to costs against the plaintiff.—*Buck vs. Miller*. 171
8. Although in Chancery the party who fails must, *prima facie*, pay costs, yet a very broad discretion belongs to the Court in regard to costs, and the right to them is not a necessary consequence of the relief prayed for and obtained; and in many cases, equity grants the relief prayed for upon condition of paying costs, or in some cases without allowing costs to either party.—*Barnard vs. Savier*. 174
9. In some cases, as of mortgages or other incumbrances having a specific lien upon property, where the owner comes to relieve the estate from the incumbrances which he put upon it, or those under whom he claims, the person having that incumbrance is not to be put to expense with regard to that proceeding, and so long as he acts reasonably as mortgagee, to that extent he is to be indemnified. *Id.*
10. But where the Court considers the mortgagee guilty of any

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misconduct, in regard to the suit or the subject of it, he will not be entitled to costs. *Id.*

11. Executors, administrators, &c., instituting or defending suits against strangers to their trusts, in those capacities, are subject to the same rules as to costs, as they would be if they were suing or defending in their own rights. *Id.*
12. A commenced a suit in assumpsit, in Justice's Court, against B, February 11, 1871, returnable February 20, 1871, which was duly served, and on the return day parties appeared, and by consent cause was adjourned without putting in any pleadings, until the 15th of March, 1871. On the 20th of February, 1871, B commenced a suit in assumpsit against A, before another Justice, returnable February 27th, and on the return day parties appeared and joined issue, the plaintiff declaring in the common counts in assumpsit, and defendant pleading general issue only, and the cause adjourned to the 28th of March, 1871. March 15th, 1871, parties in first suit appeared and joined issue, plaintiff declaring in the common counts in assumpsit, and defendant pleading general issue only, and trial had and judgement for plaintiff, for \$17 67 damages, and \$3 27 costs of suit. March 28th, 1871, second suit tried, and judgment for plaintiff, for \$25 damages, and \$4 30 costs. *Held*, notwithstanding § 3728, C. L., each plaintiff properly had judgement for costs. *Paddock vs. Kibbie.* 179.
13. In an action brought against the owner of dogs, to recover damages for killing and "worrying" plaintiff's sheep, founded on Sec. 1645, C. L., the plaintiff is entitled to judgement for double the amount of the verdict and costs, in such case.—*Dorr vs. Loucks.* 182.
14. Costs by Sec. 1645, limited to \$5 00, to which, however, must be added the costs to be allowed to the prevailing party, by the Act of 1869, page 32. *Id.*
15. Where an attachment writ had been quashed on motion of defendant for defective affidavit, before any declaration had been filed therein, and before any appearance of the defendant had been entered therein, save for the purpose of the motion. *Held*, that under Act 28, Laws of 1869, the costs therein provided to be taxed in favor of the prevailing party, under the head of "for proceedings before notice of trial," were not allowable or taxable in such a case.—*Terrill vs. Grove.* 67

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CONTINUANCE.

1. On a first application for a continuance, on account of absence of witness, the following facts should be shown: Materiality of the testimony, necessity therefor, absence of witness, endeavors made to procure his testimony or attendance at Court, the time when he is expected to return or when the party expects to procure his deposition, and that the application is not made for delay, but that justice may be done.—*Bostwick vs. Dodge*. 92.

CONTRACT.

1. Plaintiff shipped certain goods by G. W. Railway from Detroit to New York City, the price for the whole service being agreed upon by plaintiff and company, and at the same time, plaintiff signed an agreement with the company that the latter would not be liable for loss of market or other claims, arising from delay or detention, on the journey, under any circumstances. The goods were detained at Suspension Bridge, the N. Y. Central Company refusing to receive them; whereupon suit was brought by plaintiff to recover damages. *Held*, That the responsibility of the common carrier to convey the property, as agreed, to its destination, having undertaken to do so, and fixed the price for the service, may be waived by the consignor, and the common liability may be waived by a clear and distinct agreement. And when a person making a contract actually signs a paper referring in plain terms to a condition on the back of the paper itself, and a like one is at the same time delivered to him, the law presumes that he understands and assents to each and every condition contained therein.—*Hartness vs. G. W. Railway Co.* 80

CROSS BILL.

1. Where a defendant has any relief to pray, beyond what the scope of the complainant's bill will furnish him, he must file a cross bill.—*Briggs vs. Kaufman*. 160
2. To entitle a defendant to a decree against his co-defendant, a cross bill is necessary. *Id.*

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DECLARATION.

1. A declaration filed within ten days after the return day of the writ of replevin is in time.—*Kreigher vs. Warner.* 229
2. A neglect to file the declaration in time is no ground for quashing a writ. Such neglect can only be taken advantage of by rule to declare and judgment of *non pros.*—*Id.*
3. In an action brought against the owner of dogs, to recover damages for killing and “worrying” plaintiff’s sheep, founded on Sec. 1645, *C. L.*, it was held that the words, “drove, chased and hurried,” used in the plaintiff’s declaration, are equivalent to or within the meaning of the word, “worried,” as used in said section.—*Dorr vs. Loucks.* 182
4. The declaration alleged that the sheep were depasturing on the farm of the plaintiff, and in his possession when the wrong was done. *Held*, That this was a sufficient allegation that they were out of the enclosure of the defendant. *Id.*
See AMENDMENT.

EMINENT DOMAIN.

1. *Eminent domain* is the inherent right necessarily resting in every sovereignty to control and regulate the relative rights of individuals, where those rights are of a public nature, and pertain to its citizens in common. Hence, no constitutional provision is necessary to give it force.—*Hartwell*, petition of. 97
2. The power of eminent domain may be exercised by the sovereignty itself, or may be delegated. *Id.*
3. It is for the legislative department to determine what enterprises are of a public and what of a private character.—*Id.*

EQUITY PLEADINGS.

1. Pleadings in Chancery must be actually filed and served within the time required by the rules of the Court. If served upon the adverse party or his solicitor, without having been filed, such service is irregular.—*Wilder vs. Lyman, et al.* 184

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2. In such case, where an order *pro confesso* had been entered, no answer having been filed, a motion to set aside the order as irregularly entered, denied; no excuse having been given for the neglect, nor any showing of meritorious grounds of defense, nor copy of answer presented to be filed. *Id.*

3. Bill of complaint multifarious.—*Griffis vs Stoddard.* 37

4. The personal representative of a deceased mortgagor is not a necessary party to a foreclosure bill.—*Millis vs. Bagg.* 31

5. Where the Register of the Court is appointed guardian *ad litem*, on motion of the complainant, over the infant heirs of a deceased mortgagor, pending proceedings for the foreclosure of a mortgage, his acceptance of the trust should be implied from the fact of appointment; and in case of his failure to answer, the presumption is that there was no valid defence to the bill. *Id.*

6. Where the Register of the Court is appointed, on motion of the complainant, guardian *ad litem* of infant heirs of a deceased mortgagor, in a proceeding to foreclose the mortgage, and neglects to answer the bill, and a sale is made in pursuance of a decree of foreclosure, the proceedings will not be set aside unless some wrong has been done, but the irregularity may be cured by filing the answer *nunc pro tunc.* *Id.*

7. The reference to take proofs under Ch. rule 92, may be to any commissioner in the State; and it is not necessary that such commissioner shall reside in the county or circuit in which the Court making the order, sat. *Id.*
See CROSS BILL.

EQUITY JURISDICTION.

1. Courts of equity will not entertain a bill to compel offsets of unconnected, independent debts. Relief, by way compelling set-offs, will only be granted where it appears that the accounts or claims of the parties are mutual and *interdependent.*—*Flanders vs. Chamberlain.* 182

2. Whenever a locality loses its character as a place suitable for a place of residence and becomes essentially a manufacturing neighborhood, where the business generally carried on is hostile to and inconsistent with its use as a

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place of residence, a court of equity will not interfere to prevent the carrying on of the business of manufacturing, even though the trembling motion and noise thereby occasioned, renders it almost impossible to use adjoining premises as a dwelling.—*Gilbert vs. Showeyman*. 158

EQUITABLE LIEN.

1. The doctrine is well settled that a vendor of land, if he has taken no security, although he has made an absolute conveyance by deed, acknowledging full payment of the consideration, yet retains an equitable lien for the purchase money, unless there be an express or implied waiver and discharge of it.—*Brown vs. Porter*. 12.
2. A conveyance by the grantor without security, for the purpose of allowing the grantees to execute a mortgage on the property to a third person as security for a loan of money, to be used in payment of a portion of the purchase price, the grantor taking the grantee's personal bond, without security, for the payment of the remainder of the purchase price, is not a waiver of the equitable lien as to such remainder subject to the mortgage. *Id.*
3. And in case of a sale of such premises by advertisement or foreclosure of the mortgage so given, such equitable lien for the remainder of the purchase price may be enforced against any surplus money remaining after payment of the mortgage and costs of foreclosure. *Id.*

ERROR.

1. Error will not be presumed; to be considered it must affirmatively appear.—*Redmond vs. Stansbury*. 124.

EVIDENCE.

- I. Conflict in testimony—Rules as to weighing evidence, discussed.—*Kempsey vs. Mc Ginnis*. 87.
2. The plaintiff on resting his case had not made such a showing as to entitle him to recover, but his evidence offered to rebut the evidence of the defendant, showed him entitled to recover. *Held*, That whether any given testimony is elicited on the direct examination, cross-examination, re-

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examination or by way of rebutting, the Court will apply it to the issue as presented by the pleadings.—*Jones vs. Dimmock.* 87.

See PROMISSORY NOTES. 4.

EXECUTION.

1. When an execution is regular and legal upon its face, and is issued by a magistrate having apparent authority to issue it, the officer serving it will be protected.—*Foster vs. Wiley.* 25
2. Where a Justice of the Peace issued an execution on a judgement regularly rendered before him, after the case had been appealed to the Circuit Court, and delivered the same to an officer for collection, and the officer by direction of the attorney of the plaintiff in the execution, levied upon and sold, by virtue thereof, a buggy of the defendant, to satisfy the execution, after having been notified by the defendant that he had appealed the suit, *Held*, in an action of trespass by the defendant against the officer, that he could justify under the execution, and was not liable in that action. *Id.*
3. A ministerial officer is protected in the execution of process regular and legal on its face, though he may have knowledges of facts rendering it void for want of jurisdiction. *Id.*
4. Where a suit is taken from the Circuit to the Supreme Court and the judgement rendered below is affirmed, execution upon the judgement originally obtained in the Circuit Court will issue from that Court, unless there is something in the order or judgement of the Supreme Court that plainly includes the judgement in the Circuit Court.—*Altman vs. Johnson.* 41

FORCIBLE ENTRY AND DETAINER.

See JURISDICTION. 3.

FRAUD.

1. Without a suggestion of falsehood or a suppression of truth, there can be no fraud.—*Gray vs. Koch.* 119
See PROMISSORY NOTE.

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FRAUDULENT REPRESENTATIONS.

1. To entitle a party to a warrant, in actions upon contract, on the ground of fraud, under the third subdivision of Sec. 3671, *C. L.*, he must show the representations of the defendant upon which he claims to rely; that relying upon the truth of such representations he was induced to part with his property; that such representations were false, and that the defendant knew them to be false, and that he has suffered damage by reason of the premises. And the facts and circumstances tending to show the fraud must be set forth.—*Lane vs. Shellman*. 205

GARNISHEE.

1. Service of garnishee summons issued by a Justice of the Peace against a corporation, must be served on a general agent or principal officer of the company, and service on a local agent merely, will not give the Court jurisdiction.—*D. H. & I. R. R. Co. vs. Youngmans*. 143

HIGHWAYS.

1. The proviso in section 1, of the highway law, that no second application shall be made within twelve months, is not a limitation on the part of the Highway Commissioners, who may act on such second application if they please.—*Farrer vs. Highway Com'rs of Silver Creek*. 106
2. Where the record of proceedings in laying out a highway showed notice of the meeting of the Commissioners to lay out had been served on three persons, but did not show them to be owners or occupants, or who were owners or occupants, the Commissioners had no power to lay out such highway, and their order laying out was a nullity. *Id.*

INFORMATION.

1. A count in an information, that A assaulted B with intent to kill and murder, without naming the person he intended to kill, held sufficient.—*People vs Murray*. 94
2. A count in an information which charges A with assaulting B with intent to kill C, held bad, on demurrer. *Id.*

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3. After the trial has actually commenced, the Court has no power to order that the names of additional witnesses, known before the trial, may be endorsed upon the information,—*People vs O'Hara*, 170

INJUNCTION.

1. Injunctions mandatory in substance, though in form merely prohibitory, may be granted,—But to justify this extraordinary process, a case of great urgency, to prevent irreparable injury, and clear of all doubt as to complainant's title must be presented.—*Gray vs. Koch*, 119
2. An injunction may be dissolved where the answer, though not denying specifically the allegations of the bill, sets up matters which if true, are deemed a sufficient avoidance.—*Fargo vs Lovell*, 19.
3. On a motion to dissolve an injunction, where the answer sets up matters in avoidance, the complainant may reply by affidavits by way of avoidance, either traversing it or avoiding it by new matter. *Id.*
4. An injunction will not be granted to prevent an obstruction in a navigable river, unless the obstruction complained of will be a practical hinderance to the public use.—*Van Der Brooks vs. Currier*, 21
5. Where a complainant's legal right is doubtful, a court of equity will not interfere by injunction before the legal right has been established at law. *Id.*
6. An injunction may be granted to prevent the husband from disposing of his property, where it appears necessary in order to secure alimony to the wife. And third parties may be restrained from disposing of property claimed by them where the bill alleges such property to belong to the husband, and charges collusion between such third party and the husband.—*Hoover vs Hoover*, 27.
See AFFIDAVITS.

INJUNCTION MASTER.

SEE CIRCUIT COURT COMMISSIONER.

INCEST

1. Upon a trial on an information for incest, where the

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proof tended to show that the intercourse was forcible and against the will of the complaining witness with whom the intercourse was had, *Held*, that accused might be convicted of incest, even if the jury should find that the force used was such as under the circumstances, to amount to rape.—*People vs. Rouse*, 209

ISSUE ROLL.

1. No issue roll required in *certiorari* cases, and hence no fee can be taxed for making one.—*Dodge vs Corbin*. 140.

JOINT DEFENDANTS.

1. *S. L.* 1869, 101, provide that when suit is commenced against two or more *joint* defendants, one or more of whom shall reside or be found in the county where the suit shall be brought, and one or more of the defendants shall be served with process or declaration in the county where suit is commenced, the plaintiff in such action may sue out one or more writs of summons, or other writ whereby such suit was commenced, directed to the county where such defendant not so served may be found. *Held*, That the statute applies only to defendants *jointly* liable.—*Hosie vs. Harrington, et al.* 77

JUDGMENT.

1. A mere transcript of the minutes of proceedings in a case in Pennsylvania, without giving the record of pleadings, proceedings and journal entries, does not constitute a record of judicial proceedings under the Act of Congress of May 26, 1870.—*Evans vs. Reed, et al.* 212
2. The renewal of a judgment in Pennsylvania by *scire facias* without service, only keeps in force the local lien, and does not constitute a new judgment against the person so as to prevent the operation of the statute of limitations. *Id.*
3. Such new or revised judgment does not constitute an original judgment upon which a party may be sued in this State. It is based upon and controlled by the original judgment and subject to all its limitations except the local lien given by the statute of the State where rendered.—*Id.*

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4. An order by the Justice "that plaintiff retain the property by paying the charges on them, and that defendant pay the costs of suit," is not a *final judgment*.—*Duhig vs. Lipscomb*. 131
5. A defendant sued here in assumpsit on a judgment rendered in Ohio on a *cognovit*, may prove, under the plea of the general issue, any defence which in that State would be good ground for setting aside the judgment, or an order to deliver up the *cognovit* to be cancelled.—*Giddings vs. Whitlessly*. 240
See JURISDICTION, 8.

JURISDICTION.

1. Objection to the missuse of the process of the Court for the purpose of acquiring jurisdiction of the person, must be made at the first opportunity and before plea, or it will be deemed waived. It will not be heard on motion to change venue after appearance and issue joined.
2. In a transitory action the defendant who might have objected to the jurisdiction over his person, will be deemed to have waived such objection, after issue joined.—*Stilson vs. Greely*. 222
3. Circuit Judges have no original jurisdiction in cases under the Forcible Entry and Detainer Act, as amended in 1867.—*Snell vs. Scott*. 108
4. To give the Circuit Court jurisdiction in case of appeal from a Justice of the Peace, there must have been a *final judgment* rendered by such Justice of the Peace.—*Duhig vs. Lipscomb*. 131
5. It is a general rule that equity has concurrent jurisdiction with the courts of law in cases of fraud; but not to impeach a will for fraud or incompetency of the testator, though the court of equity may retain a bill involving such a question, to obtain the decision of the proper court, and then to decree accordingly.—*Griffis vs. Stoddard*. 37
6. Where there is concurrent jurisdiction, the right to maintain jurisdiction attaches to the tribunal that first exercises it. *Id.*
7. Probate Courts have jurisdiction to try all questions touching the validity of wills of personal as well as real estate. *Id.*

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8. The judgment of every court on matters within its jurisdiction, is conclusive on every other court. *Id.*
9. A Justice has no jurisdiction to enter judgment after four days from the day the cause is submitted to him.—*Sager vs. Harrison.* 90
10. A Justice's return showed that the cause was tried before him October 12, 1870, and that he took four days in which to render his judgment—that he rendered judgment October 17, 1870. *Held*, That although the return showed that the cause was decided five days after the trial, nothing appearing in the return to the contrary, the legal presumption is that the cause was not submitted to the Justice for final decision, until after the 12th of October—that the docket entries required by the statute, having been made, and the law not requiring the docket to show when the case is submitted for final decision, the ordinary presumption in favor of the correctness of official action must support the proceedings. *Id.*
11. A person arrested without warrant by the Marshal of the village of Benton Harbor must be taken before a Justice of the Peace of Benton township, and this must appear on the face of the proceedings.—*Yore vs People.* 241
12. A Justice cannot hear, try and determine a criminal charge upon a complaint alone. *Id.*
See EQUITY JURISDICTION—ACTION, 1, 2.

JURY.

1. A defendant in a criminal case cannot challenge peremptorily jurors in a Justice's Court.—*Yore vs. People.* 241

LAWYERS, SUGGESTIONS TO—154.

LICENSE.

1. A license to keep and maintain a ferry, under chapter 25, of *Compiled Laws*, is a personal trust, and is not assignable.—*Willard vs. Forsythe.* 190
2. To entitle the licensee to an injunction against one who is running upon the route of such license, he must have kept and operated a ferry in conformity with the requirements of his license. *Id.*

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3. The bond required by the licensee is a condition precedent to the enjoyment of any right under such license, and it seems that the giving and approval of such bond must be alleged in the bill of complaint. *Id.*

MANDAMUS.

1. The order to show cause is answered by affidavits, and when heard on such answer the proceedings are treated and considered prior to the issueing of the writ of mandamus as a motion or application for the issueing of the writ, and under Act No. 28, Laws of 1869, page 33, costs in such proceedings are to be awarded as in cases of special motion.—*People ex rel Greene vs. Highway Commissioners.* 61
SEE COSTS.

MARSHALING OF SECURITIES.

1. Where premises have been mortgaged, and subsequently parcels of or undivided interests in the same hands have been conveyed or incumbered, on a foreclosure of such mortgage, the premises must be sold in the inverse order of such conveyance or incumbrances.—*Briggs vs. Kaufman.* 61.

MOTION.

1. A motion to quash proceedings should state tersely and definitely the grounds of error relied upon.—*Anonymous.* 118

NEGLIGENCE.

1. In an action on the case, for negligence, the plaintiff cannot recover unless there was negligence on the part of the defendant, and freedom from contributory fault on the part of the plaintiff.—*Cook vs. Potter.* 143
2. Negligence is a violation of the obligation which enjoins care and caution in what we do,—is the want of such care as men of ordinary prudence would use under similar circumstances. *Id.*

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NEW TRIAL.

1. Motion for new trial. Citation of authorities, where the ground for the motion is newly discovered evidence.—*Beebe vs. Beebe*. 144
2. In assumpsit on a promisory note secured by chattel mortgage, the defence being want of consideration for note and fraud in obtaining mortgage, when the mortgagee had sold the mortgaged property upon due public notice, and the verdict indicated that the jury had given the defendant the value of the property mortgaged, *Held*, that the verdict was against law, and there being no objection to the charge of the Court, a new trial was granted on payment of costs.—*Keiler vs. Delano*. 40

NOTE PAYABLE IN SPECIFIC ARTICLES.

1. An agreement to pay a certain sum in specific articles at a price named, may be discharged by the payment of that sum of money. Hence, in an action on such contract, the measure of damages is not the value of the goods at the time of the breach, but the amount of money specified in the contract, with interest after due.—*Jones vs. Dimmock*. 87
2. Where suit is brought on an instrument whereby a party promised to pay a certain sum, in specific articles, in monthly installments at a price named, the production of such instrument is not *prima facie* evidence of an existing indebtedness, but the plaintiff, in order to entitle him to recover, must show, affirmatively, that the defendant has not fulfilled his contract.

NOTICE OF TRIAL.

1. A notice of trial in cases appealed from Justices's Court, signed by attorneys whose names have not been entered in the common rule book, will not be recognized. — *Hutton vs. Batch*. 68

ORDER.

See BILL OF EXCEPTIONS.

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PAYMENTS.

1. Application of—*Mc Williams vs. Davis.* 145

PARTITION FENCE.

1. C and R owned adjoining farms. By agreement between them, C was to keep up the east part, and R the west part of the division fence. Neither party complied with the agreement. R's cattle broke over the west part of the fence, upon C's lands. *Held*, That R was liable to C for damages.—*Cameron vs. Reed.* 150

PERISHABLE PROPERTY.

1. "Perishable property," in the statute providing for its sale (*Comp. Laws*, 1274, §4767,) when seized under attachment means only property in its own nature perishable, and not property which by extraordinary exposure may be liable to loss or destruction, if so situated that its safety can be provided for by the attaching officer.—*Oneida National Bank vs. Paldi.* 221

PLEADINGS.

See EQUITY PLEADINGS—PROMISSORY NOTES.

PRACTICE.

See ABATEMENT.

PROBATE COURT.

See JURISDICTION 7.

PROCESS.

See TIME 1, 2,—JOINT DEFENDANT—GARNISHEE.

PROMISSORY NOTE.

1. Adding the name of another drawer or maker to a bill or note, is a material alteration, such as will discharge the original party not consenting thereto.—*Miller vs. Finley*. 231
2. Where it was claimed that the payee named in a promissory note procured the signature of the maker while such maker was intoxicated, the intoxication being brought about by the payee named in the note, *Held*, That if the maker was so intoxicated as to be unconscious when he signed the note, such note would be void, even in the hands of a *bona fide* holder. *Id.*
3. The holder, without indorsement, of a promissory note payable to the order of the payee, may maintain an action thereon in his own name, but without prejudice to the owner's right of set-off or equities existing before the notice of the transfer.—*Redmond vs. Stansbury*. 124
4. Sueing upon a promissory note, filing it with the Justice of the Peace at the time of joining issue, and producing it at the trial, is *prima facie* evidence of the plaintiff's ownership of the note. *Id.*
5. K purchased before their maturity two notes executed by defendant. In an action brought by K, on the notes, and after verdict and an order of Court for a new trial, defendant for the purpose of denying the execution of the notes, asked leave to file an affidavit setting forth that the words, "at ten per cent. interest," in each of the notes were forged. *Held*, That the application would be granted only upon condition that the defendant should stipulate that the defence so set up should go no farther than to defeat the claim for interest accruing between the date and maturity of the notes, unless it should be found that K when he purchased, had notice of the alleged forgeries.—*Kilduff vs. Willey*. 203
6. *Mala Fides*.—Where a person purchasing within a few days after its execution, from the payee, a note payable to bearer, and knows the maker to be a responsible farmer of foreign birth and limited knowledge of English—the character of the payee's business, that he is a transient, unknown and irresponsible vender of patents, and buys such note without asking any questions, and at a large discount, he is not a *bona fide* purchaser.—*Boyer vs. Geyer*. 71

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7. A purchaser who is told the maker claims his note was given without consideration and will not pay it, is not a *bona fide* purchaser. *Id.*
8. A defendant who fails to deny the execution of a promissory note, at the time of pleading, will not be permitted to question it at the trial, even though there may appear, on the face of the instrument, some indications that it may have been altered.— *Wheeler vs. Toof.* 44
9. At the time of dedicating a church, A promised verbally, to pay \$50 towards liquidating the indebtedness of the Society and to enable it to complete its church. B, a Trustee of the Society, had advanced moneys for the Church, and A, in lieu of his promise to contribute money to the Society, gave his note for \$50 payable to B or bearer. In a suit on the note, *Held*, That the consideration was sufficient, and that B might recover in his own name. *Id.*
See BONA FIDES — NOTES PAYABLE IN SPECIFIC ARTICLES.

QUANTUM MERUIT

1. Where a person contracts to do a certain piece of work and furnish materials, and abandons his contract without fault of the other party, he will not be permitted, in a suit on a *quantum meruit* for his services and materials to recover a sum exceeding the contract price. In such case the damages to which he is entitled, is the value of the work done and materials furnished, not exceeding the contract price, less the cost of completing the work, and any damages the defendant may have sustained by reason of such failure.— *Grimes vs. Howard.* 167
2. Where such contract is abandoned through the fault of the employer, the employee may recover the value of his services and materials; and in determining the value of such materials and labor the contract of the parties may be considered, though such contract is not, necessarily, conclusive. *Id.*

REDEMPTION.

1. Where a complainant seeks to redeem real estate conveyed by deed, absolute in form, but intended as a security, which has been in the possession of the mortgagee for over twenty years, the bill must show such facts as will sustain the con-

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veyance as a *still subsisting security* subject to redemption—such facts as brings the case within the statutory exceptions preventing the bar, or rebut the presumption arising from the lapse of time.—*Taylor vs. Lovell.* 19

2. Where a party who conveys property apparently in fee, but really as security, and subsequently proposes to relinquish the right to redeem a portion of the property if other property conveyed to secure the same debt should be re-conveyed, and the notes for the unpaid part of that debt surrendered, and where, in response to such proposition the re-conveyance was made and one of the notes re-delivered, and the original grantor became bankrupt before the surrender of all the notes, *Held*, that equity will give effect to the agreement, when such original grantor attempts to enforce his alleged right of redemption. *Id*

REPLEVIN.

1. Replevin for a stock of groceries.—*Held*, That where the quantity, kind and location of the property to be replevied is given on the writ so that no other property than that claimed can be taken, the description is sufficiently particular to comply with the statute, and protect the rights of the defendant.—*Keyser vs. Warner.* 229
2. A return which shows the appraisal of goods replevied, to have been made on oath administered by the officer, to make a true appraisal, sufficiently shows in what manner in this respect the officer executed the writ. *Id.*
3. Replevin under our statute, is a possessory action and may be brought against the agent of a party, if the property is actually in his possession, instead of the principal, whether the original taking of the property was lawful or not—*Stephens vs. Taylor.* 95
4. Defendants in suit on replevin bond not liable until return of execution in replevin suit unsatisfied.—*Eaton vs. Campbell.* 10

RESISTING OFFICER.

1. A person who attempts to intimidate an officer by threats, and thereby to induce him to refrain from executing his official duty, is to be deemed guilty of opposing and resisting an officer, within the meaning of the statute.—*People vs. Jones.* 194

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SECURITY FOR COSTS.

1. Under Sec. 4115, of *Comp. Laws*, a motion to require the plaintiff to file security for costs, made at the third term after issue joined in the cause, without showing any reason for the delay, comes too late, and will be refused.—*Slyck vs. Wolcott, et al.* 65
2. Under the statute, the motion is addressed to the sound discretion of the Court, and when made at such a late day, without giving any special reason therefor, it can hardly be said to "appear reasonable and proper" to grant it. *Id.*
3. Even under Sec. 4113 requiring non-resident plaintiffs to have all writs and declarations endorsed before service thereof, by some sufficient person as security for costs, who is an inhabitant of the State, if the plaintiff neglect so to do and the defendant do not apply promptly for the security, he will be deemed to have waived it. *Id.*

SENTENCE.

1. C was convicted, before a Justice of the Peace, of assault and battery, and sentenced to pay a fine of five dollars and costs within five days, and in default thereof to be imprisoned ten days in the common jail. *Held*, That the judgment should be reversed, the sentence being uncertain and conditional.—*Cheeseman vs. People.* 139

SET-OFFS.

See EQUITY JURISDICTION.

SHERIFF.

See BOND, 1, 2, 3.

TAX TITLE.

1. The authority to tax being regulated by statute, the law must be strictly followed.—*Scott vs. Stearnes.* 111
2. Where an assessment roll can not be found in the office of the Supervisor, it is *prima facie* evidence that it never existed. *Id.*

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3. If the Overseer of Highways neglects to return to the Supervisor, *under oath*, the list of non-resident lands in his district, with amount of labor assessed thereon, and showing that the labor has not been performed or paid, the Supervisor has no authority to spread a tax upon the roll against the land. Presumption if not found in the Supervisor's office. *Id.*
4. Assessment roll not signed, invalid. *Id.*
5. There is no statute making tax deeds for tax of 1840, *prima facie* evidence of regularity of proceedings prior to execution of the deed. A paper purporting to be an assessment roll for 1840, signed only by the Clerk, did not authorize the collection of the taxes mentioned in the roll. *Id.*
6. The certificate attached to the roll must conform to the statute. *Id.*
7. *Excessive Tax—Betterments.* *Id.*

TIME.

1. Where the statute requires service of process a certain number of days before the return day, both day of service and the return day must be excluded.—*Snell vs. Scott.* 108
2. Where, by statute, an act is required to be done in any number of days less than a week, Sunday is to be excluded. *Id.*

TOWAGE.

1. The rule of the civil law giving the privilege of towing on the banks of navigable rivers, and that the privilege is embraced in the public right of navigation, is at variance with the written American constitutional law, and by the common law the privilege of towage on the banks of such rivers was never given except upon the principle of compensation to riparian owners.—*Reimold vs. Moore.* 16

TRADE MARKS.

- I. No property can be acquired in words or marks which do

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not denote the goods or property, or particular place of business of a person. *Hebl*, accordingly, that no person, by prior use, can acquire an exclusive right to the use of the words "Mammoth Wardrobe," as a sign or designation of a place where a large amount of clothing is kept.—*Gray vs. Koch*. 119

TRANSFER OF CAUSE.

1. Application by Foreign Insurance Co., doing business in the States, for transfer of cause to U. S. Court, denied.—*Rose vs. Commercial Ins. Co.* 104
It is no ground for the transfer of a cause, under section 3445 of the *Compiled Laws*, that the Judge of the Circuit Court has been consulted or employed as counsel in the cause, unless such consultation or employment took place before the statute took effect.—*Ladd vs. M. E. Church of East Saginaw*. 156
3. A commenced in the Circuit Court for the County of Wayne, against D and H. D then resided in N. Y. and H in Wayne Co, Michigan. Pending the suit, H moved to Illinois. Defendants then apply, under Act of Congress approved March 2, 1867, to remove the cause to U. S. Court. Application denied.—*Dustin vs. Dickinson*. 6

TRESPASS.

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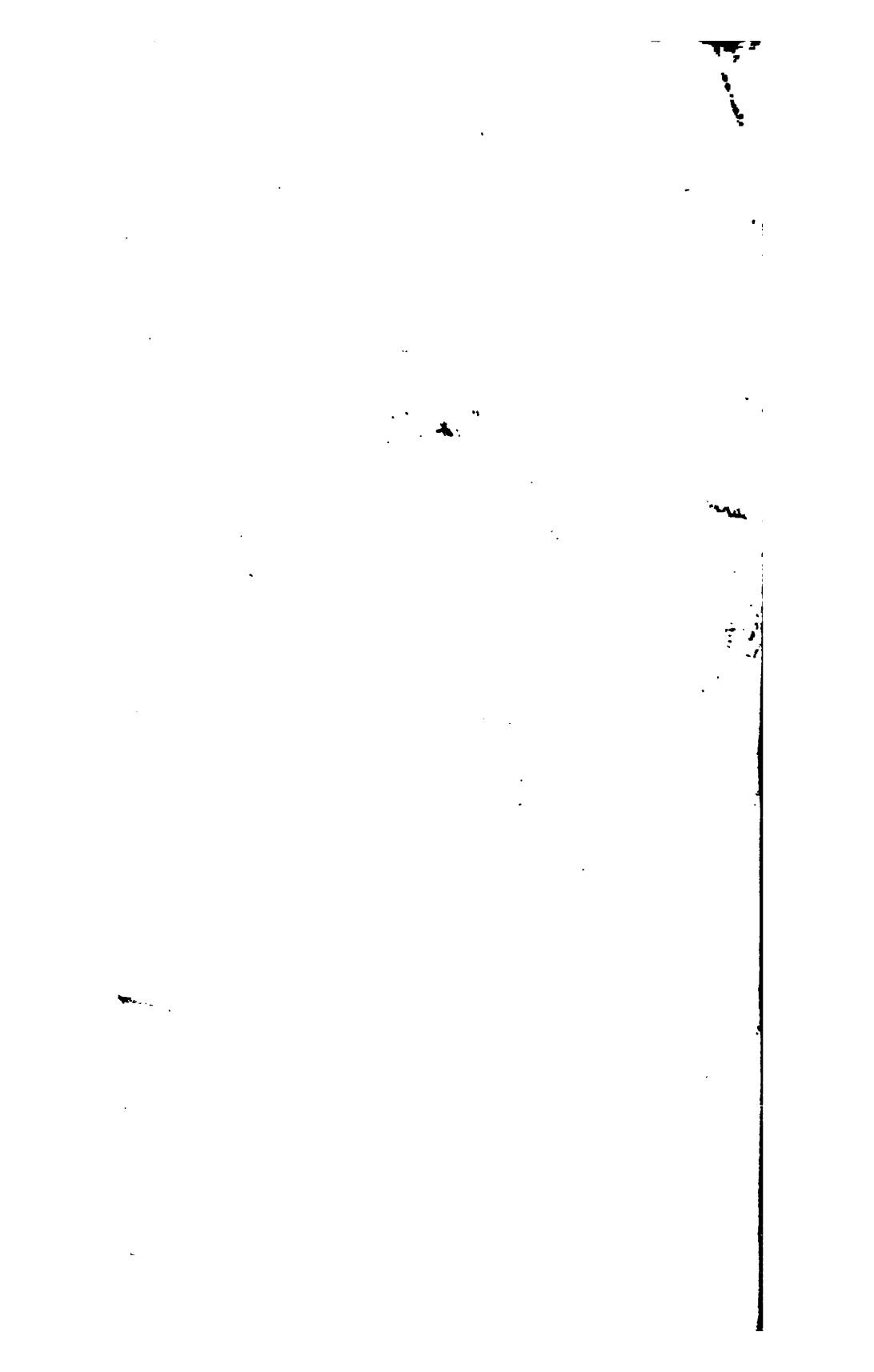
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